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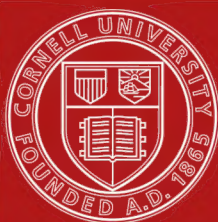
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**Illustrative cases in realty /**



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# ILLUSTRATIVE CASES

IN

## REALTY.

BY

W. S. PATTEE, LL. D.,

DEAN OF COLLEGE OF LAW, UNIVERSITY OF MINNESOTA.

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PART I.—LAND.

PART II.—ESTATES.

PART III.—TITLE.

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## PREFACE.

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It is the object of this entire series to make a clear and accurate statement of that part of jurisprudence with which the several volumes respectively deal, and to accompany each statement with a case illustrating its application. Such a combination of principle and "Illustrative Case" aids both the understanding and the memory. In addition to this advantage, the numerous cases and authorities cited, which the student is expected to read, furnish an opportunity for him to examine the principle in its applications to facts and circumstances greatly varying in their nature, interest, and importance.

Being "Illustrative" of the principles considered, I have deemed it desirable to select American cases rather than English, as the student will find an advantage in being familiar with the reports of his own country in the early days of his practice. English authorities, however, are not ignored. They are frequently cited in the notes, it being our object to familiarize the pupil with the history and growth of each principle to which we direct his attention.

W. S. PATTEE, LL. D.,  
*Dean of College of Law.*

UNIVERSITY OF MINNESOTA.



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# ILLUSTRATIVE CASES

IN

## REALTY.

### LAND.

Land includes the soil of the earth and every tangible thing permanently connected therewith, either by nature or art, and extends from the surface indefinitely upward and downward.

### PRINCIPLE.

*Quicquid plantatur, solo solo cedit.*

### SOIL.

Land, of course, includes the soil, which retains its character as realty until by severance it becomes personalty.

RILEY *et al.* v. BOSTON WATER POWER Co. *et al.*

Supreme Judicial Court of Mass., 1853.

11 Cush. 11.

DEWEY, J. It is certainly true that for an injury to his real estate, the party cannot maintain trover. That form of action is appropriate exclusively to the recovery of damages for the unlawful conversion of personal property. But this being granted, the further inquiry is, whether the three hundred and ninety-four squares of earth severed from the land of the plaintiffs, and removed from the same and sold to the defendants, and used by them, was at the time of such purchase by the

defendants, and use of the same, still a part of the realty, and retained unchanged its character as such, or whether by the act of separation in fact, and a removal of the earth to a distant place, it has not changed the character of the earth so removed to that of personal property. It seems to us that it is very well settled that whatever is severed from the land—as, in the familiar case of standing timber trees—if such trees, being a part of the realty, are cut down, they cease to be real estate, and become personal. But this transmutation, while it changes the character of the property in this respect, does not change its ownership. It would not do so if cut down by the owner of the land, and not any more so, by being cut down by a person entering unlawfully upon the land and making the severance. It is the actual severance that changes the property from real to personal, and that irrespective of its being done with, or without, the consent of the owner of the land. And in this respect we see no distinction between removing living trees, deriving their nourishment from the earth, and the removal of a portion of the earth itself.

It is next objected that the plaintiffs, by bringing this action of trover, and waiving their action of trespass *quare clausum*, have adopted and sanctioned the original act of trespass, and therefore cannot maintain this action against one who purchased the earth *bona fide* of the trespassers. We do not perceive that any such claim appears. It is true that the plaintiffs have not elected to institute an action of trespass *quare clausum* against the original wrong-doers. But as regards these defendants, who have the property of the plaintiffs without right, nothing is waived; they did not commit any trespass upon the plaintiffs' land, and no action could have been maintained against these defendants therefor. Their first connection with the plaintiffs' property was after it had been severed from the realty, and the only mode of enforcing a claim against them for the value of the same is by a personal action. If the plaintiffs have not this remedy, they are remediless as to any recovery against those who have received and converted to their own use their property. Take the case of valuable timber trees, cut down

and carried away from the land, and sold by a mere trespasser. Is the owner of the same deprived of all remedy against any person who may have received these timber trees by purchase from the trespasser? He is so, unless trover will lie; for trespass *quare clausum* will not lie against such purchaser.

It is further contended that if the defendants were *bona fide* purchasers, and without notice of the trespass, the plaintiffs must prove a demand on the defendants, and a refusal by them to redeliver before the commencement of the action. The Court ruled upon this point, if such purchase <sup>was</sup> made in the manner above stated, yet, if they received the earth from the trespassers by a purchase for their own use, and directed that the same be deposited on the filling-ground, they would be liable without any such demand and refusal. This ruling may be fully supported upon the ground of a conversion in fact of the earth, and the impracticability of a redelivery of the earth after it had become thus intermingled with the soil of the land on which it was placed, and had become a part of the solid earth. Whenever there has been an actual conversion, or whenever the property has been thus appropriated, it is evidence of a conversion which supersedes the necessity of any demand. This view is to us a satisfactory answer to the objection here urged, that there was no proof of a demand. But, upon other grounds, under the late decision of this Court in the case of *Stanley v. Gaylord*, 1 Cush. 536, a case where the whole subject was much considered, and where the Court came to the result that a *bona fide* purchase from one who had the actual possession of the property, but without any right to retain possession as against the lawful owner, and actual taking the same under such purchase into the custody and control of the purchaser, would subject him to an action of trespass or trover at the suit of the lawful owner, without any previous demand.

Exceptions overruled.

WILLIAMS REAL PROP. 14-15, 496, note a.

## THINGS IMBEDDED IN THE SOIL.

**Petroleum, salt, coal, and other minerals imbedded in the soil are part of the land.**

KIER *v.* PETERSON.

Supreme Court of Pennsylvania, 1861.

41 Pa. St. 357.

WOODWARD, J. I concur in the judgment of the majority, on the ground that the plaintiff's action was misconceived. I hold that trover was not his appropriate remedy. A few words will suffice to exhibit my views.

Petroleum, or, as it is called in the West Indies, Barbadoes tar, is a species of mineral, which, while it exists in its natural deposits in the earth, is included in the very comprehensive idea which the law attaches to the word *land*. It is part of the land. It is land. As such it belonged to Peterson, in the place where the present dispute arose. He held it by the same title by which he held the surface, or the salt which underlay the surface. He was absolute proprietor of all things between the surface and centre of the earth at that place, saving only the government's right to share in the gold and silver that might be found. It was his freehold, and the petroleum and the salt were parts of the freehold.

By the article of agreement of October 30, 1837, he leased the premises to Thomas and Samuel M. Kier, for purposes of salt-wells. Under certain conditions and restrictions the lease was to endure as long as the salt-wells should be carried on by the Kiers, the survivor of them or their assigns. The rent reserved was every twelfth barrel of salt made on the premises. It was in effect and substance a sale of the crude salt in the land for one-twelfth of the manufactured article. Now, there is no doubt that the absolute owner of land may sell a partial interest in it as well as the whole. He may sell the surface and retain the minerals, or he may sell one or more of the minerals and retain the surface. This is every day's experience in the mining districts.

But it is self-evident that when he carves out a particular interest and sells it, he retains all the rest as absolutely as

before he conveyed a part. Therefore I cannot doubt that Peterson was as exclusively and as absolutely the owner of the petroleum in this land after the lease of October 30, 1837, as before. There is not a word in the instrument which imports his intention to part with anything more than the salt in his land, and such timber and stones as should be necessary for erecting and maintaining saltworks. Every matter and thing in and pertaining to the land which was not conveyed to the Kiers by that instrument was retained by Peterson.

But the Kiers could not exercise their right to raise salt without raising petroleum. They severed both the salt and the petroleum from the freehold, and brought both to their lawful possession at the surface. They were not trespassers. The severance of the petroleum was an inevitable incident of their exercise of clearly granted rights. The grant of the right to take salt was the grant of all incidental rights which were indispensable to the exercise of the main one. Hence, their severance of the petroleum from the freehold, and their possession of it, were lawful. The work of separating the oil and salt was not difficult. With opportunity given them the fluids would separate themselves. But the Kiers, in lawful possession of both before separation, were to control the work of separation, and were in lawful possession of each after that work was accomplished. For this reason I hold the action of trover will not lie. Although Peterson had not lost his right of property in the petroleum, yet a mere right of property in a chattel is not sufficient to maintain trover. (The plaintiff must have also the right of possession at the time of conversion: ) 1 Chit. Pl. 164; Saunders P. & E. 1138. In *Mather v. Trinity Church*, 3 S. & R. 509, the principle was carried further still, and it was held that trover for stone and gravel dug from land does not lie by one who has the right of possession, against a person who has actual adverse possession of the land and sets up title to it. In our case, Peterson had no right of possession of the land whatever, and the Kiers were not in as mere adverse holders, but Peterson had conveyed the right of possession to them, and they were in under and according to his title. Nor

were they guilty of waste in severing the petroleum from the freehold, since it was an inseparable consequence from the right granted to them by the landlord. Their actual possession, therefore, of the severed chattel was in every sense a rightful possession, and because no right of possession existed in Peterson at the moment of severance, trover will not lie.

On this ground alone I am for reversing the judgment. I hold Peterson entitled to compensation for the value of his oil, and I suppose a bill in equity for account would be his most natural and efficacious remedy. I think the learned Judge below apprehended correctly the measure of compensation. Peterson would not be entitled to the labor of the Kiers, but only to the value of the oil at the instant of separation from the freehold. But his remedy, whatever the extent of it, is to be sought in another form of action.

NOTE.—Gold and silver. *Moore v. Smaw*, 17 Cal. 195; *Lyddall v. Weston*, 2 Atk. 19.

**Waters which percolate through the earth are a part of the land and are subject to absolute ownership.**

OCEAN GROVE CAMP MEETING ASSN. *v.* ASBURY PARK.

Court of Chancery, New Jersey, 1885.

40 N. J. Eq. 447.

BIRD, V. C. More than fifteen years ago the complainants purchased a large tract of land fronting upon the ocean, chiefly for the purposes of a summer resort, to exercise the right of worship. The enterprise has so grown that in winter it has a population of about five thousand, and in summer of ten thousand or fifteen thousand. The authorities soon discovered that to preserve the good health of the residents and visitors it was absolutely necessary to improve their water-supply and sewerage system. To do this they bored for water, and at the depth of over four hundred feet struck water which gave them a flow of fifty gallons per minute, at an elevation above the surface of twenty-eight feet. This they carried into the city by means of pipes, and supplied therewith about seventy



hotels and cottages. They also applied it to the improvement of their sewerage system. The volume of water thus produced continued to flow undiminished in quantity and with unabated force until the action of the defendants now complained of, and to restrain which the bill in this cause was filed.

The commissioners of Asbury Park, a corporate body, purchased a large tract of land immediately north and adjacent to the tract owned by Ocean Grove. Under their management this, too, has become a famous seaside resort. Its population is equal to, if not greater, at all times, than that of Ocean Grove. The authorities saw a like necessity for an increased supply of wholesome water. They entered into a contract with others, a portion of these defendants, to procure for them water by boring in the earth. These, their agents, sank several shafts to the depth of over four hundred feet without satisfactory success. One shaft yielded about four gallons to the minute, and another, which yielded the most, only nine. All of these wells were upon the land and premises of the Asbury Park Association. It became evident, and is manifest to the most casual observer, that these wells would not supply the volume of water needed. It was also manifest that the experiment to procure water by digging upon their own land had been quite reasonably extended, although not so complete as to satisfy the mind that they cannot obtain water on their own premises as well as elsewhere, since it is in evidence that there are two wells on their premises, sunk by individuals, which produce fifteen gallons each per minute, being as much in quantity as they procure from the well which is complained of.

Failing in their efforts upon their own premises they go elsewhere, on the land owned by individuals, and, procuring a right from individual owners, sink a shaft upon the public highway, near to the land of the complainants, and within five hundred feet of the complainants' well. This bore extended to the depth of four hundred and sixteen feet, within eight feet of the depth of complainants' well. At this depth they secured a flow of water at the rate of thirty gallons per

minute, and the supply from the complainants' well was almost immediately decreased from fifty gallons to thirty per minute. The diminution in water was immediately felt by many of those who depended for a supply from this source in Ocean Grove.

The Asbury Park authorities propose to sink other wells still nearer the well of the complainants. This bill asks that they may be prohibited from so doing, and that they may be commanded to close the well already opened, which, it is alleged, is supplied from the same source that the complainants' well is supplied from.

The complainants are first, in point of time. They are upon their own land and premises. They procure water from their own soil to be used in connection with their said premises, in the improvement and beneficial enjoyment of their occupation.

In this they have exercised an indefeasible and unqualified right. It matters not whether the water which they obtain is from a pond or underground basin, or only the result of percolation, or from a flowing stream. The defendants went from their own land upon the land of strangers, and obtained permission to bore for water, and there sink their shaft, procuring water from the same source that the complainants procured their water, and diverted it and carried it to their premises, three-eighths of a mile, for use.

Can they be restrained from doing this? A very careful consideration of a great many authorities leads me to the conclusion that they cannot at the instance of the complainants: Angell on Water-Courses, §§ 109–114, inclusive; Gould on Waters, § 280; Ballard v. Tomlinson, L. R. (26 Ch. Div.) 194; Chasemore v. Richards, 7 H. L. Cas. 349; 5 H. & N. 982; Acton v. Blundell, 12 M. & W. 324; Chase v. Silverstone, 62 Maine, 175; Roath v. Driscoll, 20 Conn. 533; Delhi v. Youmans, 45 N. Y. 362; Goodale v. Tuttle, 29 N. Y. 459; Wheatley v. Baugh, 25 Pa. St. 528; Frazier v. Brown, 12 Ohio St. 294.

The Courts all proceed upon the ground that waters thus

used and perverted are waters which percolate through the earth, and are not distinguished by any certain and well-defined stream, and, consequently, are the absolute property of the owner of the fee as completely as are the ground, stones, minerals, or other matter to any depth whatever beneath the surface. The one is just as much the subject of use, sale, or diversion as the other. The owner of a mine encounters innumerable drops of water escaping from every crevice and fissure; these, when collected, interfere with his progress, and he may remove them, although the spring or well of the land-owner below be diminished or destroyed. So, the owner or owners of a bog, marsh, or meadow may sink wells therein, and carry off the water collected in them, to the use or enjoyment of a distant village or town, although the waters of a large stream upon the surface be thereby so diminished as to injure a mill-owner who had enjoyed the use of the waters of the stream for many years. Upon these principles there can be no doubt but that every lot-owner in Ocean Grove or Asbury Park could sink a well on his lot to any depth, and, in case one should deprive his neighbor of a portion or all of his supposed treasure, no action would lie. A moment's reflection will enable every one to perceive that such conditions or contingencies are necessarily incident to the ownership of the soil.

In the case before me there is no proof that the waters in question are taken from a stream, and I have no right to presume that they are. The presumption is the other way.

It seems to be my very plain duty to discharge the order to show cause, with costs.

Clark v. Conroe, 38 Vermont, 470.

**Surface water falling upon land is a part of it and subject to absolute ownership**

**BARKLEY v. WILCOX.**

Court of Appeals, New York, 1881.

86 N. Y. 140.

ANDREWS, J. This is not the case of a natural water-course. A natural water-course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a water-course, that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course because, in times of drought, the flow may be diminished, or temporarily suspended. It is sufficient if it is usually a stream of running water: Angell on Water-Courses, § 4; *Luther v. The Winnisimmet Co.*, 9 Cush. 171.

The parties in this case own adjacent lots on a street near a village, but not within the corporate limits. The findings are, that the natural formation of the land was such that surface water from rains and melting snows would descend from different directions, and accumulate in the street in front of the plaintiff's lot in varying quantities, according to the nature of the seasons, sometimes extending quite back upon the plaintiff's lot; that in times of unusual amount of rain, or thawing snow, such accumulations, before the grading of the defendant's lot, were accustomed to run off over a natural depression in the surface of the land across the defendant's lot, and thence over the lands of others, to the Neversink River; that when the amount of water was small, it would soak away in the ground; that in 1871 the defendant built a house on his lot, and used the earth excavated in digging the cellar to improve and better the condition of his lot, by grading and filling up the lot and sidewalk in front of it, about twelve inches, and on a subsequent occasion he filled in several inches more; that in the spring of 1875 there was an unusually large accumulation of water from melting snow and rains in front of and about the plaintiff's premises, so that the water ran into the cellar of his house, and occasioned serious damage; that the filling in of

the defendant's lot had the effect to increase the accumulation of water on the plaintiff's lot, and contributed to the injury to his property.

There is no natural water-course over the defendant's lot. The surface water, by reason of the natural features of the ground, and the force of gravity, when it accumulated beyond a certain amount in front of the plaintiff's lot, passed upon and over the lot of the defendant. The discharge was not constant, or usual, but occasional only. There was no channel or stream, in the usual sense of those terms. In an undulating country there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hillsides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions, water-courses. Whether, when the premises of adjoining owners are so situated that surface water falling upon one tenement naturally descends to and passes over the other, the incidents of a water-course apply to and govern the rights of the respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this State. It was referred to by DENIO, C. J., in *Goodale v. Tuttle*, 29 N. Y. 467, where he said: "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." The case in which these observations were made did not call for the decision of the question, but they show the opinion of a great Judge upon the point now in judgment. Similar views have been expressed in subsequent cases in this Court, although in none of them, it seems, was the question

before the Court for decision : *Vanderwiele v. Taylor*, 65 N. Y. 341 ; *Lynch v. The Mayor*, 76 Ib. 60. The question has been considered by Courts in other States, and has been decided in different ways. In some the doctrine of the civil law has been adopted as the rule of decision. By that law, the right of drainage of surface waters, as between owners of adjacent lands, of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude : *Corp. Jur. Civ.* 39, tit. 3, §§ 2, 3, 4, 5 ; *Domat* [Cush. ed.], 616 ; *Code Napoleon*, art. 640 ; *Code Louisiana*, art. 656. The Courts of Pennsylvania, Illinois, California, and Louisiana have adopted this rule, and it has been referred to with approval by the Courts of Ohio and Missouri : *Martin v. Riddle*, 26 Pa. St. 415 ; *Kauffman v. Griesemer*, Ib. 407 ; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484 ; *Gormley v. Sanford*, 52 Ib. 158 ; *Ogburn v. Connor*, 46 Cal. 346 ; *Delahoussaye v. Judice*, 13 La. Ann. 587 ; *Hays v. Hays*, 19 La. 351 ; *Butler v. Peck*, 16 Ohio St. 334 ; *Laumier v. Francis*, 23 Mo. 181. On the other hand, the Courts of Massachusetts, New Jersey, New Hampshire, and Wisconsin have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there ; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs, or prevents, the surface water from passing thereon from the premises above, to the injury of the upper proprietor : *Luther v. The Winnisimmet Co.*, 9 Cush. 171 ; *Parks v. Newburyport*, 10 Gray, 28 ; *Dickinson v. Worcester*, 7 Allen, 19 ; *Gannon v. Hargadon*, 10 Ib. 106 ; *Bowlsby v. Speer*, 2 Vroom, 351 ; *Pettigrew v. Evansville*, 25 Wis. 223 ; *Hoyt v. Hudson*, 27 Ib. 656 ;

Swett v. Cutts, 50 N. H. 439. It may be observed that in Pennsylvania, house lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that State, in respect to surface drainage: Bentz v. Armstrong, 8 Watts & S. 40. And in Livingston v. McDonald, 21 Iowa, 160, the Court, in an opinion by DILLON, J., after stating the civil-law doctrine, say, that it may be doubted whether it will be adopted by the common-law Courts of this country, so far as to preclude the lower owner from making in good faith improvements which would have the effect to prevent the water of the upper estate from flowing or passing away. Professor Washburn states that the prevailing doctrine seems to be that if for the purposes of improving and cultivating his land, a land-owner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed on to the first-mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do: Wash. on Easements, [2d ed.] 431.

Upon this state of the authorities, we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view on the one hand individual rights, and on the other the interests of society at large. Upon consideration of the question, we are of opinion that the rule stated by DENIO, C. J., in Goodale v. Tuttle, is the one best adapted to our condition, and accords with public policy, while at the same time it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *aqua currit et debet currere ut currere solebat*, expresses the general law which governs the rights of owners of property on water-courses. The owners of land on a water-course are not owners of the water which flows in it. But each owner is entitled, by virtue of his ownership of the soil, to the reasonable use of the water as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream, by owners above and below him. Such use is in-

cident to his right of property in the soil. But he cannot divert, or unreasonably obstruct the passage of the water, to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to which, in civilized society, the waters of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by any individual of the water in a natural water-course, or any unreasonable interruption in the flow. It is said that the same principle of following the order of nature should be applied between coterminous proprietors in determining the right of mere surface drainage. But it is to be observed that the law has always recognized a wide distinction between the right of an owner to deal with surface water falling or collecting on his land, and his right in the water of a natural water-course. In such water, before it leaves his land and becomes part of a definite water-course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use, or get rid of it in any way he can, provided only that he does not cast it by drains, or ditches, upon the land of his neighbor; and he may do this, although by so doing he prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to mill-owners or other proprietors on the stream. So, also, he may, by digging on his own land, intercept the percolating waters which supply his neighbor's spring. Such consequential injury gives no right of action: *Acton v. Blundell*, 12 M. & W. 324; *Rawstron v. Taylor*, 11 Exch. 369; *Phelps v. Nolen*, 72 N. Y. 39. Now, in these cases there is an interference with natural laws. But those laws are to be construed in connection with social laws, and the laws of property. The interference in these cases with natural laws is justified, because the general law of society is that the owner of land has full dominion over what is above, upon, or below the surface, and the owner, in doing the acts



supposed, is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law: Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N. Y. 475; *Miller v. Laubach*, 47 Pa. St. 54. But it does not follow, we think, that the owner of land, which is so situated that the surface waters from the lands above naturally descend upon and pass over it, may not in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own. Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to surface drainage would, we think, place undue restriction upon industry and enterprise, and the control by an owner of his property. Of course, in some cases, the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon considerations of public policy and general utility. Which rule will, on the whole, best subserve the public interests, and is most reasonable in practice? For the reasons stated, we think, the rule of the civil law should not be adopted in this State. The case before us is an illustration of the impolicy of following it. Several house lots (substantially village lots), are crossed by the depression. They must remain unimproved, if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands, to one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say that there may not be cases which, owing to special conditions and circum-

stances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed.

All concur.

Judgment affirmed.

See *Adams v. Walker*, 34 Conn. 466.

**Water congealed and attached in the form of ice to the soil is a part of it.**

WASHINGTON ICE CO. *v.* SHORTALL.

Supreme Court of Illinois, 1881.

101 Ill. 46.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of trespass *quare clausum fregit*, brought in the Circuit Court of Cook County by Shortall, against the Washington Ice Company, for cutting, removing, and appropriating, in January and February, 1879, a quantity of ice which had formed over the bed of the Calumet River, within the limits of plaintiff's land, in Cook County. Defendant pleaded the general issue, and *liberum tenementum*. A verdict and judgment were rendered in favor of plaintiff for \$562.40, which judgment, on appeal to the Appellate Court for the First District, was affirmed, and defendant appealed to this Court.

On the trial, the patent from the United States to Lafrombois and Decant was introduced in evidence, showing that there was no restriction or reservation by the government, and that the *locus in quo* was embraced in the 125.31 acres the patent conveyed. Under this patent plaintiff derived title.

From the evidence it appears that the call of 125.31 acres contained in the patent required that the bed of the river should be included to make that quantity; that the Calumet River, extending from Lake Michigan westward past the plaintiff's premises, where it is between 165 and 200 feet wide, is in fact a navigable river; that the defendant company

owned ice-houses on its own property on the next lot east of plaintiff's, and that in operating on the ice it did not go on the plaintiff's land, save as it entered upon the ice; that it first gathered the ice in front of its own land from the river, and then commenced to take the ice opposite the plaintiff's premises.

The Court, at plaintiff's request, instructed the jury that the plaintiff was the owner of the whole bed of the river flowing through his premises; that when the water became congealed, the ice attaching to the soil constituted a part thereof, and belonged to the owner of the bed of the stream, and that he could maintain trespass for the wrongful entry and taking the ice; and that the measure of damages, in case of a finding for plaintiff, would be the value of the ice as soon as it existed as a chattel—that is, as soon as it had been scraped, plowed, sawed, cut, and severed, and ready for removal. Defendant excepted to the giving of such instruction, and asked the Court to instruct the jury that a riparian owner on the banks of a river, navigable in fact, has no property in the ice formed in the midst of the stream, where he has done nothing to pond or separate it; but that any person might, as against such riparian owner, where he could gain access without passing over the shore or banks of the owner, enter upon the ice and remove the same, without cause of action or damage to such riparian owner, and that if such access as above stated had been gained, then at most, plaintiff could recover but nominal charges, even if the action of trespass be sustained—which was refused, and defendant excepted. The giving and refusing of instructions is assigned as error.

It may be well to inquire, first, whether plaintiff, as riparian proprietor on both sides of the Calumet River, is the owner of the bed of the stream within the limits of his land. By the common law, only arms of the sea, and streams where the tide ebbs and flows are regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its centre, and the only right the public has therein is an easement for

the purpose of navigation. Chancellor KENT, in his Commentaries, declares it as settled that grants of land bounded on rivers or upon their margins, above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it: 3 Comm. 427, 428, Marg. And this title to the middle of the stream includes the water, the bed, and all islands: 2 Hilliard on Real. Prop. 92; Angell on Water-Courses, § 5.

This rule of the common law has been adopted in this State, and is here the settled doctrine. It was so held in *Middleton v. Pritchard*, 3 Scam. 510, and *Houck v. Yates*, 82 Ill. 179, with regard to the Mississippi River where it bounds this State; in *Braxton v. Bressler*, 64 Ill. 488, as to Rock River; *City of Chicago v. Laffin*, 49 Ill. 172, and *City of Chicago v. McGinn*, 51 Ill. 266, in regard to the Chicago River.

The Calumet River then been non-tidal, and plaintiff owning lands on both sides of it, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it.

The next question respects the ownership of ice formed over the bed of the river passing through the land. It is objected by defendant that water in a running stream is not the property of any man—that no proprietor has a property in the water itself, but a simple usufruct while it passes along; but manifestly different considerations apply to water in a running stream when in a liquid state and when frozen.

In *Agawam Canal Co. v. Edwards*, 36 Conn. 497, it is said: "The principle contained in the maxim, '*cujus est solum ejus est usque ad cælum*,' gives to a riparian owner an interest in a stream which runs over his land. But it is not a title to the water—it is a usufruct merely—a right to use it while passing over the land. The same right pertains to the land of every other riparian proprietor on the same stream and its

tributaries; and as each has a similar and equal usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below."

In *Elliott v. Fitchburg Railroad Co.*, 10 Cush. 191, SHAW, C. J., says: "The right to flowing water is now well settled to be a right incident to property in the land, it is a right *publico juris*, of such character that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet as one of the beneficial gifts of Providence each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. . . . Still, the rule is the same, that each proprietor has a right to the reasonable use of it for his own benefit, for domestic use, and for manufacturing and agricultural purposes."

In *Rex v. Wharton*, 12 Mod. 510, HOLT, C. J., says: "If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land."

Hilliard states that a water-course is regarded in law as a part of the land over which it flows: 2 Hilliard on Real Prop. 100.

It will thus be seen that the riparian owner, as such, has rights with respect to water in a running stream—he has a right of use, which right authorizes the actual taking of a reasonable quantity of the water for his purposes. The limitation in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor as it passes along his land. The only opposing rights are such rights of the public, and such upper and lower proprietors. But when the water

becomes congealed, and is in that state, these opposite rights are in nowise concerned. The ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream when flowing over their land. The just and reasonable use of the water which belongs to the riparian proprietor would be, in such case of congealed state of the water, the unlimited use and appropriation of the ice by him, as it would be no interference with rights of others. We are of opinion there is such latter right of use, and that it should be held property, of which the riparian owner cannot be deprived by a mere wrong-doer. When water has congealed and become attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers? And we do not perceive why there is not as much reason to allow to the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner.

In *McFarlin v. Essex Co.*, 10 Cush. 309, SHAW, C. J., remarked: "It is now perfectly well established as the law of this Commonwealth, that in all waters not navigable in the common-law sense of the term—that is, in all waters above the flow of the tide—the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water to the middle or thread of the river."

The riparian proprietor has the sole right, unless he has granted it, to fish with *nets* or *seines* in connection with his own land: Angell on Water-Courses, § 67.

In *Adams v. Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut River above the flowing

and ebbing of the tide, have an exclusive right of fishery<sup>1</sup> opposite to their land, to the middle of the river; and that the public have an easement in the river as a highway, for passing and repassing with every kind of water craft. So, too, sea-weed thrown upon the shore belongs to the owner of the soil upon which it is cast: *Emans v. Turnbull*, 2 Johns. 313.

The exclusive right in the owner to take the ice formed over his land, is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned, and may with like propriety be recognized. It is connected with and in the nature of an accession to the land, being an increment arising from formation over it, and belonging to the land properly, as being included in it in its indefinite extent upwards.

Ice, from its general use, has come to be a merchantable commodity of value, and the traffic in it a quite important business. It would not be in the interest of peace and good order, nor consistent with legal policy, that such an article should be held a thing of common right, and left the subject of general scramble, leading to acts of force and violence. In reference to the rule which we here adopt, of assigning to the owner of a bed of a stream property in the ice which forms over it, we may well use, as fitly applying, the language of *HOSMER, J.*, in *Adams v. Pease*, *supra*, in speaking of the common-law rule as to the right of fishery, viz.: "The doctrine of the common law, as I have stated it, promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner."

The views we hold are in accordance with the holding in *The State v. Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the

<sup>1</sup>As to the right of fishery in this State, in riparian proprietors, see *Beckman v. Kreamer*, 43 Ill. 447, and cases there cited.

right to prevent its removal. See further, relative to the subject, *Myer v. Whitaker*, 55 How. Pr. Rep. 376; *Lorman v. Benson*, 8 Mich. 18; *Mill River Woolen Manufacturing Co. v. Smith*, 34 Conn. 462; *Brown v. Brown*, 30 N. Y. 519.

Defendant claims that it committed no trespass in taking the ice, because the ice in the midst of a stream navigable in fact is naturally an obstruction to navigation, and that any one has the right, having obtained access independent of the riparian owner, to enter upon the ice and remove it. We said in *Braxon v. Bresler*, above cited: "Where the river is navigable, the public have an easement or a right of passage upon it as a highway, but not the right to remove the rock, gravel, or soil, except as necessary to the enjoyment of the easement." The same is to be said as to the ice here. But it was not removed as necessary for the enjoyment of the public easement of navigation—it was for the purpose only of the appropriation of it for defendant's gain.

As to the instruction as to the measure of damages, we think the case is analogous to those where coal is taken from the soil, and that the instruction is sustained by former decisions of this Court in those cases: *Illinois & St. Louis R. R. and Coal Co. v. Ogle*, 92 Ill. 353; *McLean County Coal Co. v. Lennon*, 91 Ib. 561; *Illinois & St. Louis R. R. and Coal Co. v. Ogle*, 82 Ib. 627; *McLean County Coal Co. v. Long*, 31 Ib. 359; *Robertson v. Jones*, 71 Ib. 405.

Perceiving no error in the giving or refusing of instructions by the Circuit Court, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

For full discussion, see Cent. L. J., vol. 37, No. 18, p. 357.



But waters flowing in a definite channel are not a part of the land in the sense that they are subject to ownership.

PHILLIPS *v.* SHERMAN.

Supreme Judicial Court of Maine, 1873.

64 Maine, 171.

APPLETON, C. J. The defendant is the owner of a grist mill and privilege situate on a stream issuing from Hebron Pond in Monson. The evidence shows that in 1820, a dam and grist mill were erected at the outlet of said pond. In 1841, the then owner of the privilege rebuilt and enlarged the grist mill and deepened the channel thereto. Formerly fifty bushels of wheat and corn were daily ground at this mill. More recently the number has been reduced to a daily average of about twenty bushels. The consequence is that a much less quantity of water is now vented than formerly.

The plaintiff's mill and dam situated some distance below, on the same stream, was built in 1844. The defendant's privilege and dam have been occupied and enjoyed by him and those under whom he derives his title for a much longer period than is necessary to acquire an adverse title by prescription. Without detailing the evidence, we think it is satisfactorily proved that the defendant has all the rights which prior occupancy can give as well as those which can be acquired by prescription, so far as regards the height of his dam.

The defendant, then, has a right to keep and maintain his dam at its present height with all the water necessary to propel his machinery. But of this the plaintiff makes no complaint. The defendant claims the right to retain water not needed in any way for the use of his mill, nor necessary for its full enjoyment, and to the loss and injury of those whose mills are below him on the same stream.

The defendant, owning the privilege above, and being the first occupant upon the stream, has a prior right to all the water necessary to propel his machinery. But while this right is sustained and protected he must use the water in a reasonable and proper manner, having regard to the like reasonable use by all the proprietors above and below. He cannot un-

necessarily, and at his own will and pleasure, detain the water an unreasonable length of time, nor discharge it in such excessive quantity that it would endanger those below. Every owner of mills above is required so to use the water that every riparian proprietor below shall have the enjoyment of it substantially, according to its natural flow, but subject to the necessary and unavoidable interruption arising from its reasonable and proper use by the privilege above. It cannot be unnecessarily and wantonly detained. Each riparian proprietor on a running stream, whether above or below, has a right to the reasonable use and enjoyment of the water, and to the natural flow of the stream, subject to such disturbance and the consequent inconvenience and annoyance as might result to him from a reasonable use of the waters by others. The owner of a mill and dam has a right to the reasonable use of the water, but he must detain it no longer than is necessary for its profitable enjoyment, and then return it to its natural channel. A wanton or vexatious or unnecessary detention would render the mill-owner so detaining liable in damages to those injured by such unlawful detention: *Hetrich v. Deachler*, 6 Barr, 32; *Davis v. Winslow*, 51 Maine, 264; *Davis v. Getchell*, 50 Maine, 602. In all these cases the question is whether or not the use has been reasonable: *Thurber v. Martin*, 2 Gray, 396; *Pool v. Lewis*, 5 American Rep. (41 Ga. 162) 526; *Holden v. Lake Co.*, 53 N. H. 654; Washb. on Easements, 268; *Springfield v. Harris*, 4 Allen, 496.

So far as the defendant or those under whom he derives his title have by artificial means improved the stream, those improvements inure to the benefit of those below. The result is that the defendant has a right to use the water in his pond for the running of all the machinery upon his dam. He has a right to detain it when required for the reasonable use of his mill. His rights are prior and superior to those of the plaintiff. But he cannot be permitted, in mere wantonness, to detain water not to be used, and of which there is no need whatever in the running of his mill.

The question of reasonable use of the water is one of fact, to

be determined by the jury. The parties have referred that question to the Court. Upon the whole evidence we are of opinion that the defendant has unreasonably withheld water, neither necessary nor required for the use of his mill.

Accordingly, there must be judgment for the plaintiff for \$25 damages.

WALTON, BARROWS, DANFORTH, and PETERS, JJ., concurred.

*Mitchell v. Warner*, 5 Conn. 497; *Clinton v. Myers*, 46 N. Y. 511; *Moulton v. Water Company*, 137 Mass. 163.

#### THINGS ATTACHED BY NATURE.

**Things attached to land by nature, as standing corn, are a part of it and pass under a deed thereof.**

TRIPP *v.* HASCEIG.

Supreme Court of Michigan, 1870.

20 Mich. 254.

GRAVES, J. The plaintiff in error sued Hasceig for the alleged conversion of a quantity of standing corn, which Tripp claimed as his property, and upon the trial a verdict passed for Hasceig. Tripp now brings error, and insists that the Circuit Judge erred in charging the jury, and he asks that the judgment be reversed therefor.

The evidence conduced to show that Tripp, being the owner of a farm in Kalamazoo County, on which he resided, and on which he had raised a field of corn in the season of 1865, conveyed the farm to defendant about the 13th of December, in the same year, by warranty deed, while the corn was still standing, unsevered, where it grew, and without inserting in the deed any exception or reservation; and that Hasceig took and appropriated a part of the crop as properly conveyed to him by the deed. It was claimed by Tripp on the trial that the crop, being over-ripe when the deed was given, did not pass by the conveyance, but the Circuit Judge advised the jury that the corn, though ripe and no longer deriving nourishment from the ground, would, if still attached to the soil, pass

by conveyance of the land ; and this is one of the rulings complained of.

We think this instruction was right, and we concur in the suggestion of the Circuit Judge—that whether the corn would pass or not, could no more depend upon its maturity or immaturity than the passage of a standing forest tree by the conveyance of the land would depend upon whether the tree was living or dead.

It is true that the authorities, in alluding to this subject, very generally use the words *growing* crops, as those embraced by a conveyance of the land, but this expression appears to have been commonly employed to distinguish crops still attached to the ground rather than to mark any distinction between *ripe* and *unripe* crops.

In some cases, where the question has been raised under the statute of frauds, as to the validity of verbal sales of unsevered crops, a distinction has been drawn between such as were fit for harvest and such as were not, upon the supposition that the former would not be within the statute, while the latter would be embraced by it. See cases referred to in *Austin v. Sawyer*, 9 Cow. R. 39. In *Austin v. Sawyer*, however, Chief Justice SAVAGE seems to have rejected the distinction, as he held that a verbal sale of *growing crops* was valid in New York.

But one case has been cited, or is remembered, in which it has been intimated that a mature and unsevered crop would, because of its being ripe, remain in the grantor of the land, on an absolute conveyance of the premises without exception or reservation ; and that is the case of *Powell v. Rich*, 41 Ill. 466, and the point was not essential to the decision there.

There are many authorities, however, opposed to the distinction suggested in that case : 2 Bl. Com. 122, note 3 ; Broom's Maxims, 354 margin.

In *Kittredge v. Woods*, 3 N. H. 503, Judge RICHARDSON cites *Wentworth*, 59, for the proposition that “ when the land is sold and conveyed without any reservation, *whatever crop is upon*

*the land passes,*" and, after stating that *ripe grain* in the field is subject to execution as a chattel, Judge RICHARDSON adds: "*Yet no doubt seems ever to have been entertained that it passes with the land when sold without any reservation.*" And in the case of *Heavilon v. Heavilon*, 29 Ind. 509, cited by plaintiff's counsel on another ground, the Court expressly admit that until severance the crop, as between vendor and purchaser of the land, is part of the realty. Indeed, the authorities are quite decisive that, whether the crop of the seller of the farm goes with the land to the purchaser of the latter, when there is no reservation or exception, depends upon whether the crop is at the time attached to the soil, and not upon its condition as to maturity. And this seems to be the most natural and most practical rule. When parties are bargaining about land, the slightest observation will discover whether the crops are severed or not, and there will be no room for question or mistake as to whether they belong with the land or not, if owned by the vendor.

If, however, the crops are to be considered as land or personal chattels, as they continue or do not continue to draw nourishment from the soil, the instances will be numerous in which very difficult inquiries will be requisite to settle the point.

It was further urged by plaintiff in error that if it should be considered that the corn would pass by the deed still the jury should have been allowed to inquire whether the parties did not enter into a contemporaneous verbal agreement, by which the grain was to belong to Tripp as part of the consideration for the farm. Without pausing to consider whether the plaintiff could be permitted to make the proof suggested, or could support his action by any arrangement like that supposed, it is quite sufficient to observe that there does not appear to have been any evidence fairly tending to show the existence of such an agreement. The plaintiff was himself on the stand, and yet he did not hint at the existence of a bargain of that kind.

It was finally insisted that the charge of the Court was

erroneous in stating that a subsequent agreement by the vendee, that the vendor should have the corn, would be void for want of consideration; and we are told that the error on this point is shown by the circumstance that there was enough to warrant the jury in finding that defendant was under an equitable obligation, to have the deed so reformed as to except the corn, and that this fact constituted a sufficient consideration for an agreement by Hasceig, that the crop should belong to Tripp.

This argument assumes that if the non-reservation of the corn in the deed was by mistake satisfactorily ascertained, or admitted, that then an equity would arise for the correction of the deed, which in turn would be an adequate consideration to support a subsequent agreement by Hasceig, that the grain should belong to Tripp. We need not examine the validity of this view, since it is quite manifest that the case contemplated by it is not found in the record before us.

The position taken implies that there was evidence before the jury to establish, according to the requirements of a Court of Equity, a mistake in the deed in not reserving the corn, and that there was also evidence conducing to prove a subsequent agreement that Tripp should have the corn, and resting for consideration on the right to have the deed corrected in equity.

There was a little evidence favoring the idea of a subsequent parol recognition by Hasceig of the right of Tripp to the corn under the conveyance of the land, but we look in vain for evidence of the assumed mistake in the deed.

It is well settled that to raise an equity to correct a deed there must not only be an error on both sides, but the mistake must be either *admitted or directly proved*: Adam's Eq. 171 margin; Fry on Specif. Per. 2d Am. ed., p. 312, top and note 11. The language of several of the cases cited by plaintiff's counsel is to the same effect. In *Kennard v. George*, 44 N. H. 440, the Court say that the mistake must *be clearly proved*. In *Canedy v. Marcy*, 13 Gray, 373, it is said that the Court has jurisdiction to reform a deed upon *clear oral evidence of the*

*mistake*, and in *Beardsley v. Knight*, 10 Vt. 185, the expression is still stronger. It is there declared that the Court will correct a mistake in a conveyance "*when undeniably proved*," and that "*unless it be so proved it will not interfere*." It is very certain that the record before us fails to show that a mistake in the deed was established on the trial below, or that any evidence was there introduced fairly tending to show that fact, and therefore, upon the theory of plaintiff's counsel there was no evidence of any consideration for a subsequent agreement by Hasceig that Tripp should have the corn.

The charge of the Court should be construed in the light of the evidence before the jury, and when viewed in this way we discover nothing of which the plaintiff can justly complain.

In order to preclude all misapprehension as to the scope of this decision, we deem it not improper to add that we express no opinion as to whether Tripp would be liable to Hasceig for any part of the crop appropriated by the former, with the acquiescence of the latter, under a verbal reservation.

The judgment of the Court below is affirmed, with costs.

CAMPBELL, C. J., and COOLEY, J., concurred.

CHRISTIANCY, J. I concur with my brethren in the opinion of my brother GRAVES; but had it appeared in the case that it was the custom of the country where the farm was situated (as it is in some of the Western States) to keep the ripe corn in the field for the winter, or till wanted for use or market, and to be taken only on the like occasions or for the like reasons, as if stored in the crib or granary, thus using the field merely as a substitute for such crib or granary, I am inclined to think I might have agreed in the opinion intimated by the Supreme Court of Illinois in *Powell v. Rich*, 41 Ill. 466, cited by my brother GRAVES.

*Kittridge v. Woods*, 3 N. H. 503; 49 Minn. 412.

NOTE.—In absence of debts crops go to the devisee as part of the land: *Dennett v. Hopkinson*, 63 Maine, 350; *Bradner v. Faulkner*, 34 N. Y. 347; *Green v. Armstrong*, 1 Denio, 550.

WILLIAMS REAL PROP. 13.

**Trees standing, or even prostrate if attached to the soil, are a part of the realty.**

COCKRILL *v.* DOWNEY.

Supreme Court of Kansas, 1868.

4 Kan. 427.

BAILEY, J. This was an action for trespass, commenced before Alonzo Cottrell, J. P., by plaintiff in error, against defendant in error, to recover the value of three loads of wood, hauled from the land of the plaintiff in error, by the defendant in error, claiming triple damages under the provisions of ch. 208 of the Comp. L. The action was commenced on the 28th day of December, 1866, and, after several continuances, was tried by a jury, who found a verdict for the plaintiff. The defendant appealed, and the cause was again tried at the April term of the District Court of Marshall County, 1867, and judgment rendered for the defendant.

The plaintiff in error, who was also the plaintiff below, now brings the case to this Court to procure a reversal of the last-mentioned judgment.

It appears from the bill of exceptions that the defendant, Downey, and one Abraham Gossuck, were the former owners of the land on which the alleged trespass was committed, and that Gossuck and wife conveyed all their interest in the land to Caloni Walworth, by deed dated February 10, 1865, and that subsequently, on the 28th of August, 1865, defendant, Downey, conveyed all his interest in said land to Walworth, without any reservation whatever, and that said Walworth conveyed the land to plaintiff by deed of warranty, without reservation.

On the trial, the defendant filed no answer to plaintiff's petition on appeal, but offered himself as a witness to prove, with others, that there was a parol reservation of the dead and down timber in the deed from Downey to Walworth, and also in the deed from Walworth to plaintiff, Cockrill. Objection was made to this evidence, but the objection was overruled by the Court, and the evidence admitted. We think the Court erred in admitting the evidence. The policy of our laws, as evinced by the whole tenor of legislation as to registration of deeds and



the like, is to make titles to real estate depend upon the written deeds of the parties, leaving the smallest possible margin for patrol contracts, understandings, and reservations.

A deed of land must be, we think, deemed to involve all timber standing or growing on it, unless specially excepted. As to trees standing and growing in the soil, we apprehend that no question would be made; but a tree may be standing and not growing, or growing in a horizontal position, not standing.

Must the law apply a different rule in each case? Suppose the case of trees prostrated by a tornado, but with roots still adhering to the soil; shall they pass by the deed, or be reserved by parol? Obviously, such trees must be considered as part of the realty, and we think that there can be no safer general rule than that founded on the old maxim, "*Cujus est solum ejus est usque ad cælum*," which may, perhaps, be liberally translated: "The owner of the soil owns from the centre of the earth up to the sky." Various qualifications and limitations have been established as to fixtures, emblements, and the like; but we find no judicial warrant or authority for the claims of the defendant in this case.

The judgment must be reversed, and the case remanded for a new trial.

**Trees even severed, but lying as they fell, are a part of the land in that they pass under a deed thereof.**

BRACKETT *v.* GODPARD.

Supreme Judicial Court of Maine, 1866.

54 Me. 309.

APPLETON, C. J. This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the

lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property, and may be seized and sold on execution: *Staples v. Emery*, 7 Greenl. 301. So, wheat or corn growing is a chattel, and may be sold on execution: *Whipple v. Tool*, 2 Johns. 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed: 2 Kent, 346, or by statute, as in this State, by R. S., c. 81, § 6, clause 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser: *Goodrich v. Jones*, 2 Hill, 142. Hop poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop, and piled in the yard, with the intention of being replaced in the season of hop raising, are part of the real estate: *Bishop v. Bishop*, 1 Kenan, 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks RICHARDSON, C. J., in *Kittridge v. Wood*, 3 N. H. 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation." The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the statute of 1867, c. 88, defining the ownership of down timber. It would have

been otherwise had they been cut into logs or hewed into timber: *Cook v. Whitney*, 16 Illinois, 481.

The defendant, at the plaintiff's request, traveled from another State, as a witness, to testify for him in his suit against Works. He claims to have his fees allowed in set-off in this suit. His account in set-off was regularly filed. He is entitled to compensation therefor, which, as claimed, will be travel from his then place of residence, and attendance, in accordance with the fees established by statute.

Off-set allowed.—Defendant defaulted, to be heard in damages.

#### LINE TREES.

**A tree standing upon the line of adjoining owners is equally their real property.** x

#### GRIFFIN v. BIXBY.

Supreme Court of New Hampshire, 1841.

12 N. H. 454.

PARKER, C. J. If the committee had not run out and marked a line when they set off the dower of Mrs. Nahor the course mentioned in the return must have determined the boundary between the parties; and parol evidence could not have been admitted to show that there was previously a marked line there, varying from the course, and that the committee intended to adopt that line: *Allen v. Kingsbury*, 16 Pick. R. 235. But in this case the committee marked a line, and in this respect the present case differs from that just cited, where the monuments were not erected at the time the dower was set off, but at some antecedent period, and for some purpose not known or explained.

As the monuments in this case were marked at the time by the committee, and intended to designate the land set off, we are of opinion that this constituted an actual location, and that they must control the course mentioned in the return: *Brown v. Gay*, 3 Greenl. R. 126; *Ripley v. Berry*, 5 Greenl. 24; *Esmond v. Tarbox*, 7 Greenl. R. 61; *Thomas v. Patten*, 13 Maine

R. 329; *Prescott v. Hawkins*, ante, 20, 26; and see 1 U. S. Dig. 474. The evidence offered tends to show that the parties understood that the line was marked and established by monuments, and acted with reference to that fact, which strengthens the case, and shows the propriety of the rule: *Jackson v. Ogden*, 7 Johns. R. 241; *Clark v. Munyan*, 22 Pick. R. 410.

As to the second question, in *Waterman v. Soper*, 1 Ld. Raym. 737, cited for the defendants, HOLT, C. J., ruled that if A plants a tree on the extremest limits of his land, and the tree growing extend its root into the land of B, next adjoining, A and B are tenants in common of this tree, and that where there are tenants in common of a tree, and one cuts the whole, though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting. What action he shall have is not stated, nor is it quite clear that such an ownership can be established, if the root merely extend into the other's land.

But in Co. Litt. 200, b., it is said, "If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves."

And in *Cubitt v. Porter*, 8 B. & C. 257, it was held that "the common user of a wall separating adjoining lands, belonging to different owners, is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands in equal moieties, as tenants in common;" and "where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built, of a greater height than the old one, it was held that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other."

It seems to have been admitted that for an entire destruction of the wall by one trespass might have been sustained.

Without going to the extent of the ruling in Lord RAYMOND, we are of opinion that a tree standing directly upon the line

between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not, and that trespass will lie if one cuts and destroys it without the consent of the other. See cases cited in *Odiorne v. Lyford*, 9 N. H. Rep. 511.

**A tree is a part of that land only on which its trunk stands, even though its roots extend into and its branches overhang other lands.**

LYMAN *v.* HALE.

Supreme Court of Connecticut, 1836.

11 Conn. 177.

BISSELL, J. This writ of error is reserved for our advice ; and the principal question raised and discussed is whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy.

It is admitted that the tree stands upon the plaintiff's land, and about four feet from the line dividing his land from that of the defendant. It is further admitted, that a part of the branches overhang, and that a portion of the roots extend into the defendant's land. If, then, he be a joint owner of the tree with the plaintiff, he is so in consequence of one or the other of these facts, or of both of them united. It has not been insisted on in the argument that the mere fact that some of the branches overhang the defendant's land creates such a joint ownership. Indeed, such a claim could not have been made with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. "Thus" (it is said) "if a house overhang the land of a man, he may enter and throw down the part hanging over, but no more ; for he can abate only that part which constitutes the nuisance: 2 Roll. 144, l. 30 ; *Rex v. Pappineau*, 2 Stra. 688 ; *Cooper v. Marshall*, 1 Burr. 267 ; *Welsh v. Nash*, 8 East. 394 ; *Dyson v. Collick*, 5 Barn & Ald. 600 ; 7 Serg. & Lowb. 205 ; Com. Dig. tit., action on the case for a nuisance :

D. 4. And in *Waterman v. Soper*, 1 *Ld. Raym.* 737, the case principally relied on by the defendant's counsel, it is laid down : "That if A plants a tree upon the extremest limits of his land, and the tree, growing, extend its root into the land of B, next adjoining, A and B are tenants in common of the tree. But, if all the root grows in the land of A, though the boughs overshadow the land of B, yet the branches follow the root, and the property of the whole is in A."

The claim of joint ownership, then rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground the charge proceeded in the Court below ; and on this the case has been argued in this Court. We are to inquire, then, whether this ground be tenable. The only cases relied upon in support of the principle are the case already cited from *Ld. Raymond*, and an anonymous case from *Rolle's Reports*, 2 *Roll.* 255. The principle is, indeed, laid down in several of our elementary treatises : 1 *Sw. Dig.* 104 ; 3 *Stark. Ev.* 1457, n. *Bul. N. P.* 84. But the only authority cited is the case from *Ld. Raymond*. And it may well deserve consideration, whether that case is strictly applicable to the case at bar ; and whether it carries the principle so far as is necessary to sustain the present defense. That case supposes the tree to be *planted* on the "extremest limit"—that is, on the *utmost point or verge* of A's land. Is it not, then, fairly inferable, from the statement of the case, that the tree, when grown, stood in the dividing line ? And in the case cited from *Rolle*, the tree stood *in the hedge* dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases, that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the lands of another, they therefore become tenants in common of the tree ? We think not ; and, if it were, we cannot assent to it ; because, in the first place, there would be insurmountable difficulties in reducing the principles to practice ; and, in the next place, we think the weight of authorities is clearly the other way.

How, it may be asked, is the principle to be reduced to

practice? And here it should be remembered that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry, whether any portion of the roots extend into his land. It is this fact alone which creates the tenancy in common. And how is the fact to be ascertained?

Again: if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportions do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriates all the products, on what principle is the account to be settled between the parties?

Again: suppose the line between adjoining proprietors to run through a forest, or grove. Is a new rule of property to be introduced in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees, growing, indeed, on his own land, but near the line; and whether he can safely cut them, without subjecting himself to an action?

And again: on the principle claimed, a man may be the exclusive owner of a tree one year, and the next a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth.

It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so by the controlling force of authority. The cases relied upon for its support have been examined. We do not think them decisive. We will very briefly review those which, in our opinion, establish a contrary doctrine.

In the case of *Masters v. Pollie*, 2 Roll. Rep. 141, it was adjudged that, where a tree grows in A's close, though the roots grow in B's, yet, the body of the tree being in A's soil, the tree

belongs to him. The authority of this case is recognized and approved by LITTLEDALE, J., in the case of *Holder v. Coates*, 1 Moo. & Malk. 112; 22 Serg. & Lowb. 264. He says: "I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so."

The same doctrine is also laid down in *Millen v. Fandrye*, Pop. Rep. 161, 163; *Norris v. Baker*, 3 Bulstr. 178. See, also, 20 Vin. Abr. 417; 1 Chitt. Gen. Pr. 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant are not joint owners of the tree; and that the charge to the jury in the Court below was on this point erroneous.

It is, however, contended that although the charge on this point was wrong, there ought not to be a reversal, as upon another ground the defendant was clearly entitled to judgment in his favor.

It is urged that land comprehends everything in a direct line above it; and, therefore, where a tree is planted so near the line of another's close that the branches overhang the land, the adjoining proprietor may remove them. And, in support of this position, a number of authorities are cited. The general doctrine is readily admitted; but it has no applicability to the case under consideration. The bill of exceptions finds that the defendant gathered the pears growing on the branches which overhung his land, and converted them to his own use, claiming a title thereto. And the charge to the jury proceeds on the ground that he has a right so to do. Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use: *Beardslee v. French*, 7 Conn. Rep. 125; *Welsh v. Nash*, 8 East. 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; 7 Serg. & Lowb. 205; 2 Phill. Ev. 138.

On the whole, we are of opinion that there is manifest error in the judgment of the Court below, and that it be reversed.

The other Judges ultimately concurred in this opinion;



WILLIAMS, C. J., having at first dissented, on the ground of a decision of the Superior Court in Hartford County (*Fortune v. Newson*), and the general understanding and practice in Connecticut among adjoining proprietors.

Judgment reversed.

*Skinner v. Wilder*, 38 Vt. 113; *Belyea v. Beaver*, 34 Barb. 547; *Dubois v. Beaver*, 25 N. Y. 122; *Hoffman v. Armstrong*, 48 N. Y. 201.

#### DEPOSITS BY FORCES AND PROCESSES OF NATURE.

**An aerolite becomes a part of the land on which it falls, imbedding itself in the soil.**

GOODARD *v.* WINCHELL.

Supreme Court of Iowa, 1892.

52 N. W. R. 1124.

GRANGER, J. The District Court found the following facts, with some others not important on this trial: "That the plaintiff, John Goodard, is, and has been since about 1857, the owner in fee simple of the north half of section No. 3, in township No. 98, range No. 25, in Winnebago County, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to. (2) That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson. (3) That on the 2d day of May, 1890, an aerolite passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about sixty-six pounds, fell onto plaintiff's land, described above, and buried itself in the ground to a depth of three feet, and became imbedded therein at a point about twenty rods from the section line on the north. (4) That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland took it to his house, and claimed to own same, for the reason that he had found same and dug it up. (5) That on May 5, 1890, Hoag-

land sold the aerolite in suit to the defendant, H. V. Winchell, for \$105, and the same was at once taken possession of by said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that defendant knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land. . . . (10) I find the value of said aerolite to be one hundred and one dollars (\$101) as verbally stipulated in open court by the parties to this action; that the same weighs about sixty-six pounds, is of a black, smoky color on the outside, showing the effects of heat, and of a lighter and darkish gray color on the inside; that it is an aerolite, and fell from the heavens on the 2d of May, 1890; and that a member of Hoagland's family saw the aerolite fall, and directed him to it." As conclusions of law, the District Court found that the aerolite became a part of the soil on which it fell; that the plaintiff was the owner thereof; and that the act of Hoagland in removing it was wrongful. It is insisted by appellant that the conclusions of law are erroneous; that the enlightened demands of the times in which we live call for, if not a modification, a liberal construction, of the ancient rule "that whatever is affixed to the soil belongs to the soil," or, the more modern statement of the rule, that "a permanent annexation to the soil of a thing in itself personal makes it a part of the realty." In behalf of appellant is invoked a rule alike ancient and of undoubted merit, "that of title by occupancy;" and we are cited to the language of Blackstone, as follows: "Occupancy is the taking possession of those things which before belonged to nobody;" and "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, and supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or finder." In determining which of these rules is to govern in this case, it will be well for us to keep in mind the controlling facts giving rise to the different rules; and note, if at all, wherein the facts of this case should

distinguish it. The rule sought to be avoided has alone reference to what becomes a part of the soil, and hence belongs to the owner thereof, because attached or added thereto. It has no reference whatever to an independent acquisition of title—that is, to an acquisition of property existing independent of other property. The rule invoked has reference only to property of this independent character, for it speaks of movables “found upon the surface of the earth or in the sea.” The term “movables” must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of earth or sea, but are on the one or in the other. Animals exist on the earth and in the sea, but they are not, in a proper sense, parts of either. If we look to the natural formation of the earth and sea, it is not difficult to understand what is meant by “movables,” within the spirit of the rule cited. To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth, and not movables.

If, from what we have said, we have in mind the facts giving rise to the rules cited, we may well look to the facts of this case to properly distinguish it. The subject of the dispute is an aerolite, of about sixty-six pounds weight, that “fell from the heavens” on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature’s deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing “on the earth.” It was in the earth, and in a very significant sense immovable—that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as “un-

claimed by any owner," and, because unclaimed, "supposed to be abandoned by the last proprietor," as should be the case under the rule invoked by appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned, by accretion or natural causes. The general rules of the law, by which the owners of riparian titles are made to lose or gain by the doctrine of accretions, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the

scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "telltale messengers" from far-off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or, as appellant is pleased to dominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of \$101, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but, under the natural law of its government, it became a part of this earth, and, we think, should be treated

as such. It is said by appellant that this case is unique; that no exact precedent can be found; and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In the American and English Encyclopedia of Law (vol. 15, p. 388) is the following language: "An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of *Maas v. Amana Soc.*, 16 Alb. Law J. 76, and 13 Ir. Law T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. Law J. 299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration; the information as to them being too meagre to indicate the trend of legal thought. Our conclusions are announced with some doubts as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is controlling in the case, and we need not consider others.

The judgment of the District Court is affirmed.

Manure deposited upon farming lands is a part of the realty.

DANIELS v. POND.

Supreme Judicial Court of Massachusetts, 1838.

21 Pick. 367.

SHAW, C. J., drew up the opinion of the Court. Two questions arise in the present case, the first, as to the form, the second, as to the plaintiff's right of action.

1. The tenant in this case was tenant at will; and it seems a well-settled rule that if a tenant at will commits waste it is a determination of the will and an act of trespass, and that *quare clausum fregit* will lie by the reversioner: *Phillips v. Covert*, 7 Johns. R. 1; *Suffern v. Townsend*, 9 Johns. R. 35.

It was further contended that the plaintiff had not such a possession of the manure as would enable him to maintain trespass *de bonis asportatis*.

The plaintiff, by the purchase, had become owner of the farm with all its incidents, subject only to the tenancy at will of Nason. If the manure became the plaintiff's at all it was as part of and incident to the realty. Nason had a qualified possession of it for a special purpose only, that is, to be used upon the farm. The moment he sold it the act was an abandonment of that special purpose, he parted with his only right to the possession or custody of it, it vested in the plaintiff as owner of the freehold, and the right of possession followed the right of property: *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Walcott v. Pomeroy*, 2 Pick. 121; *Ayer v. Bartlett*, 9 Pick. 156. As the tenant's sale conveyed no title to the defendant, the action of trespass well lies against him if the property was the plaintiff's.

2. The Court are of opinion that manure made on a farm occupied by a tenant at will or for years in the ordinary course of husbandry, consisting of the collections from the stable and barn-yard, or of composts formed by an admixture of these with soil or other substances, is by usage, practice, and the general understanding so attached to and connected with the realty that, in the absence of any express stipulation on the

subject, an outgoing tenant has no right to remove the manure thus collected, or sell it to be removed, and that such removal is a tort, for which the landlord may have redress; and such sale will vest no property in the vendee: *Lassel v. Reed*, 6 Greenl. 222; *Kittridge v. Woods*, 3 N. H. 503. The authority of the first of these cases is supposed to be impaired by a subsequent one decided by the same Court: *Staples v. Emery*, 7 Greenl. 201. But the Court do not profess to call in question the correctness of their former decision, but, on the contrary, affirm it and distinguish the latter case from it.

The rule here adopted will not be considered as applying to manure made in a livery stable, or in any manner not connected with agriculture or in a course of husbandry.

In the present case the defendant had notice, both from Blake and from the plaintiff, of the claim and title of the plaintiff to the manure before the sale; he therefore stands in the same situation with Nason, neither better nor worse.

Judgment for the plaintiff.

NOTE.—Though deposited by his own cattle and made from his own fodder, the tenant has no title to the manure made upon the leased premises in the usual course of husbandry: *Lassel v. Reed*, 5 Greenl. 222; *Lewis v. Jones*, 17 Pa. St. 262.

It passes with the land to the grantee by deed: *Kittridge v. Wood*, 3 N. H. 503; *Hill v. De Rochemont*, 48 N. H. 87; *Perry v. Carr*, 44 N. H. 118; *Brown v. Thurston*, 56 Me. 127; *Powell v. Rich*, 41 Ill. 466.

*Gradual accretions become a part of the soil to which they adhere.*

INGRAHAM *v.* WILKINSON.

Supreme Judicial Court of Massachusetts, 1826.

4 Pick. 268.

PARKER, C. J. The material facts upon which we are to decide this case are that the island in dispute between the parties is situated in Pawtucket River, where it is not navigable for ships or boats, and where the tide does not ebb and flow; that the plaintiffs are owners of a tract of land on the east side of the river, extending up and down the river be-



yond the island, and that the defendants are owners of a similar tract on the west side of the river; that the island is not held by any separate grant by either, nor does any other person claim it by virtue of any grant or by possession; and that both the plaintiffs and the defendants, and those under whom they severally claim and hold their farms on the main land, have occasionally cut trees on the island, but that no agricultural improvement has been made thereon. In a partition of the estate among the heirs of Ebenezer Bucklin, father of the grantor of the plaintiffs, this island was set off to those heirs in 1766, but it does not appear that any possession was taken or holden under the partition, except the occasional cutting of wood for forty or fifty years past. It appeared, also, that the defendants, or those under whom they claimed, had cut wood on the island for thirty years past at pleasure, without any objection having been made by those who held under Bucklin.

It is obvious from this statement that neither the plaintiffs nor the defendants had obtained such exclusive possession of the island, or any part of it as would enable either to maintain trespass against the other, without referring their possession to some title; and it is equally obvious that no title appears in either, except what may be derived from their property in the land on either side of the stream or river opposite to the island. And thus we are obliged to consider the rights of those who own the land on the banks of streams or rivers not navigable. And this depends altogether, we think, upon the principles of the common law, there being no statute of this Commonwealth, or of the province, nor ordinance of the colony, which alters the common law in this respect, except in relation to the fisheries, which having from the beginning been made the subjects of legislative care, must be governed by such rules and regulations as the several Legislatures have established.

The common law recognizes an important distinction, as to the use of waters and the property of the soil, between rivers or waters navigable and those which are not navigable. The

former invariably and exclusively belong to the public, unless acquired from it by individuals under grant or prescription. The latter are held to belong to those whose land borders on the waters; so that they have the exclusive right of fishing in front of their own land, and have a property in the bed or soil of the river under the water, subject, however, to an easement or right of passage up and down the stream in boats or other craft for purposes of business, convenience, or pleasure. This is called, in the civil law, a servitude, which is quite consistent with the right of property. The text-book from which this common-law principle is most generally deduced is Sir Matthew Hale's celebrated treatise, *De Jure Maris*, published in Hargrave's Law Tracts, p. 37, on recurrence to which it will appear that Hale referred to the ancient British writer, Bracton, for the foundation of his doctrine, and that he also relied upon the Roman civil law, as compiled in the Digest in the reign of Justinian. See Dig. lib. 41, tit. 1, *De acquirendo Rerum Domino*, leg. 7, 12, 29, 30, 38, 56, 65, and perhaps many others.

This public right in navigable waters and the soil or flats under them is changed by the colonial ordinance of 1641, which gives to the proprietors of upland bordering on such places the property of the soil down to the channel, unless it exceed the distance of one hundred rods, reserving still, however, to the public the right of passage over the water. But, according to judicial constructions of this ordinance, these flats may be occupied by wharves or other erections, provided the passage to lands above is not thereby too much straitened or obstructed: *Anc. Charters*, etc., 148.

There appears, however, to be an important difference between the common and the civil law, in regard to the rights of the public and individuals, on this subject. By the former it would seem that the right of the king or the public is limited to those places, whether bays, coves, inlets, arms of the sea, or rivers, in which the tide ebbs and flows, this being the definition of navigable waters; whereas by the civil law all rivers properly so called, even above tide-waters, provided they

are navigable by ships or boats, or perhaps any other floating vehicle, are considered as public property; and so is the French law, as will appear by the Code Napoleon, liv. 2, tit. 1, c. 3, art. 538, in which are enumerated, among other subjects of public domain, *les fleuves et rivières navigables ou flottables*, which last word seems to have been coined to comprehend all streams on which boats, rafts, lumber, or any other species of property may be transported. It is probable that this distinction arose from the difference in magnitude between the rivers on the continent and those on the island, many of the former being navigable much beyond the ebbing and flowing of the sea, and few, if any, of the latter being of consequence for passage or transportation above the tide.

The common-law right of public property, restricted as it seems to be, except for easement or right of way, may be found very inconvenient in its application to many of the magnificent fresh-water rivers of the United States, which are navigable for small vessels and boats much above the flux of the tide, especially by the aid of steam power so rapidly getting into use. And on this account it has been decided by the Supreme Court of Pennsylvania that the public right to the bed of the river Susquehanna is the same as it is to the ports, harbors, etc., upon the sea; so that the proprietor of the banks could not extend his claim of property *usque ad filum medium aquæ*, as by the common law he would have the right: *Carson v. Blazer*, 2 Binn. 475. But the Supreme Court of New York felt themselves bound by the common law, and adjudicated accordingly in the cases reported in 17 Johns. Rep. 211, and 20 Johns. Rep. 90. And in a question relating to the fishery in the river Connecticut, one of the largest in the eastern part of the United States, the Supreme Court of Connecticut adopted the principles of the common law in regard to the extent of the property of borderers upon the river down to the *filum aquæ* or middle of the river: *Adams v. Pease*, 2 Conn. Rep. 481. In this Commonwealth the question has not directly arisen, except in regard to the fisheries, which are held to be the exclusive right of the owners of the banks of rivers, unless other-

wise appropriated by acts of the Legislature, this right being, according to our common law, held subject to the control of the Legislature, unless by particular grant or prescription it has been held free of that control.

With respect to the river now in question, however, and the part of it where the island in controversy is found, which is above tide-waters, and which we have a right to presume is not navigable even for boats, we think it clear that the common-law doctrine applies, giving to the proprietors of the banks the property of the bed of the river *usque ad filum medium aquæ*.

The question then arises, to whom belongs an island formed by a division of the waters of a river, where but for the island the borderers on the river would meet each other in the middle of the river? And this question must be settled by analogy to cases of a similar nature, which, though they may have arisen in other countries under the jurisdiction of the civil law, have nevertheless been adopted by the common law as fairly coming within its general principles.

The doctrine of alluvion and its consequences seems to be very clearly settled. That which is formed by gradual accretion belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden change of the bed of the river may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line, the *filum aquæ*, belong to him who owns the bank on that side; if formed in the middle of the river, they are appropriated to the owners on each side, not in common, but in severalty, according to their original dividing line, the *filum aquæ* as it is where the waters begin to divide. Such is the civil law, and the justice of this appropriation cannot be questioned. "If the *filum aquæ* divide itself, and one part take the east and the other the west, and leave an island in the middle between both *fla*, the one half will belong to the one lord, and the other to the other:" Hargr. Law Tr. 37. So by the civil law: Dig. lib. 41, tit. 1, § 29. "*Inter eos qui secundum unam ripam prædia habent, insula in flumine nata, non*

*pro indiviso communis fit, sed regionibus quoque divisis; quantum enim ante cujusque eorum ripan est [tantum], veluti linea in directum per insulam transducta, quisque eorum in eo habebit certis regionibus."* Although this seems applicable to several owners on the same side of the river, yet the principle must be the same when applied to the owners of the opposite sides, for it treats the river, as to the question of property in its bed, in the same manner as if no island was there. And so the compilers of the Napoleon Code consider it, who, without doubt, in most of that code, had reference to the civil law. The 561st article of the Code Napoleon, tit. 2, c. 2, is in these words: "*Les îles et atterrissements qui se forment dans les rivières non navigables et non flottables, appartiennent aux propriétaires riverains du côté où l'île s'est formée; si l'île n'est pas formée d'un seul côté, elle appartient aux propriétaires riverains des deux côtés, à partir de la ligne qu'on suppose tracée au milieu de la rivière."* Although these wise provisions seem to be confined to the case of islands recently formed, the same reason will extend them to the case of islands the origin of which cannot be traced, unless the property in them has been otherwise appropriated according to the rules of law; for whether originally formed by deposits from the water, or by a sudden division of the river, would seem to be immaterial, unless the owner of one side should be able to show that it was created by a disruption from his land.

According to these principles, therefore, this island belongs in severalty to these borderers on each side of the stream, if their lands on the main are co-extensive with the island; if not, then the owners of the next adjoining lots will have a right to claim a portion of the island conformable to their lines. And this settles the present case in favor of the plaintiffs, for it appears that the bridge removed extended from their land to the island; the removal of it was therefore a trespass. But in regard to the trees cut down, it is not shown on which part of the island they stood; so that whether they belonged to the plaintiffs or to the defendants does not appear.

The verdict, being for the defendants, must be set aside, and a new trial granted.

Trustees of Hopkin's Academy *v.* Dickinson, 9 Cush. 544.

Alluvium, whether occasioned by natural or artificial means, belongs to the owner of the soil where deposited: *Lovington v. St. Clair County*, 64 Ill. 56.

Land formed by alluvium in a river belongs to the riparian owner of the fee: *Inhabitants of Deerfield v. Ames*, 17 Pick. 41.

**In case of avulsion the soil still belongs to the first owner unless he suffers it to remain in its new place until it coalesces with the soil.**

WIGGENHORN *et al.* *v.* KOUNTZ.

Supreme Court of Nebraska, 1888.

37 N. W. R. 603; 23 Neb. 690.

MAXWELL, J. The defendant in error brought an action against the plaintiffs, in the District Court of Saunders County, to recover the value of certain trees cut down by, and converted to the use of, the plaintiffs in error. The defendant in error alleges in his petition "that from the 7th day of December, 1871, until the 29th day of November, 1882, he was the owner in fee simple and in the possession of lot one (1), in section 30, in township 13 N., of range 10 E., in Saunders County; that on or about the 1st day of September, 1881, and between that date and said 29th day of November, 1882, and while plaintiff was the owner and in possession of lot 1 aforesaid, the said defendants, Earnest A. Wiggenhorn, John Johnson, and Emery A. Clossen, unlawfully and with force broke and entered upon the plaintiff's said land, described as follows, as aforesaid, to wit: Lot 1, in section 30, in township 13 N., of range 10 E., of the 6th principal meridan, Saunders County, the State of Nebraska—and then and there cut down one hundred cottonwood trees belonging to plaintiff, and then growing on said land, and of the value of \$190, and carried the same away, and converted them to their own use, to the plaintiff's damages in the sum of \$190." Johnson filed an answer to the petition, in which he alleges, in substance, that

he was employed by Wiggenhorn to cut the trees in question, and that Wiggenhorn informed him that he had lawful authority to cut said trees. Wiggenhorn and Clossen answer jointly, denying the facts stated in the petition. On the trial of the cause, a verdict in favor of Kountz, and against all the plaintiffs in error, for the sum of \$25 was returned. A motion for a new trial was thereupon filed and overruled, and judgment entered upon the verdict. The testimony shows that, at the time stated in the petition, the defendant in error was the owner of lot 1, section 30, township 13 N., range 10 E. The land was entered prior to the year 1860, and a patent issued in that year, under which the defendant in error claims title. The lot in question is an island situated in the Platte River; there being a well-defined channel on each side of said island. In the year 1867, during high water in the Platte River, the upper part of said island was washed away, and, the testimony tends to show, formed an accretion to the lower end of said island. The timber in question was cut on the land thus formed at the lower end of the island. That sixty trees, from eight to fifteen inches in diameter, were cut on this land, and used as piles on Mr. Wiggenhorn's mill-dam, is proved beyond controversy. There is some dispute in the testimony as to whether Mr. Johnson was hired by Wiggenhorn, or sold him the piles; also whether Clossen was employed by Wiggenhorn or Johnson; but, in the situation of the case, the particulars as to the transaction are not material. All three participated in the trespass, and Mr. Wiggenhorn procured the trees, for which he claims to have paid to Johnson \$32. The proof shows that the trees, for the purpose for which they were used, were worth from \$2 to \$2.75 each. The principal defense relied upon is that the land on which the trees grew was not the property of Kountz, but was public land, to which all had equal rights; and it is claimed, further, that the land thus suddenly formed would belong to the parties owning the mainland bordering on the river near said island. These questions will be considered in their order.

In *Lammers v. Nissen*, 4 Neb. 245, Judge GANTT, in defining

the word "accretion," says: "That an accretion to land is the imperceptible increase thereto, on the bank of a river, by alluvial formations, occasioned by the washing up of sand or earth, or by dereliction, as when the river shrinks back below the usual water-mark; and, when it is by addition, it should be so gradual that no one can judge how much is added each moment of time; and, when the formation of land is thus imperceptibly made on the shore of a stream by the force of the water, it belongs to the owner of the land immediately behind it, in accordance with the maxim *de minimis non curat lex*. It is said that no other rule can be applied on just principles, for the reason that every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." In speaking of an avulsion, Washburn (3 Real Prop. 4th ed. 60) says: "Cases sometimes occur where considerable quantities of soil are, by the sudden action of water, taken from the land of one, and deposited upon or annexed to the land of another. The difference between avulsion, as the latter process is called, and alluvion, consists in the one being done by imperceptible loss from the land of one, and increment to that of the other; and in the other, its being done suddenly, to an extent which can be ascertained and measured. In the case of avulsion, the soil still belongs to the first owner, unless he shall have suffered it to remain in its new possession until it cements and coalesces with the soil of the second owner, in which case the property in the soil will be changed, and no right to reclaim it remain." If it be conceded, therefore, that the land so formed at the lower end of the island in question was formed suddenly by washing the soil from the upper end of the island to the lower, the soil would still remain that of the owner of the island, and a person cutting trees on the land so formed would be liable for the same.

The plaintiffs in error strenuously contend, in substance, that as a grant of land on a stream not navigable includes all



islands or parts of islands between the shore and the centre thread of the stream, that, therefore, the land on which the trees grew belonged to the owner of the mainland on the river adjacent to such islands. There is no doubt of the rule that grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; the rule of the common law being that proprietors of land adjoining public rivers, not affected by the flow of the tide, own the soil *ad filum aquæ*: 3 Kent, Comm. 427. In *Ingraham v. Wilkinson*, 4 Pick. 273, the Supreme Court of Massachusetts says: "The doctrine of alluvion and its consequences seems to be very clearly settled. That which is formed by gradual accretion belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden change of the bed of the river may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line—the *filum aquæ*—belong to him who owns the bank on that side; if formed in the middle of the river, they are appropriated to the owners on each side, not in common, but in severalty, according to their original dividing line—the *filum aquæ* as it is where the waters begin to divide. Such is the civil law; and the justice of this appropriation cannot be questioned. If the *filum aquæ* divide itself, and one part take the east and the other the west, and leave an island in the middle between both *fila*, the one-half will belong to the one lord, and the other to the other." In *Trustees, etc., v. Dickinson*, 9 Cush. 548, it is said: "In the case just now supposed of an island arising in the middle of the river, it is divided by that line which was the thread of the river immediately before the rise of the island. But that line must thenceforth cease to be the thread of the river, or *filum aquæ*, because the space it occupies has ceased to be covered with water. But, by the fact of an island being formed in the middle of the river, two streams are necessarily formed, by the original river dividing it into two branches. The island

itself, having become solid land, forms itself a bank of the new stream on the one side, and the old bank on the main shore forms the other. And the same rule applies on the other side of the island. There must, then, be a *filum aquæ* to each of these streams, while the old *filum aquæ* is obliterated to the extent to which land has taken the place of water. But this island, having all the characteristics of land, may soon be divided and subdivided by conveyances and descents, and all the modes of transmission of property known to the law, and thus become the property of different owners. Now, suppose another island formed in one of these branches, between the first island and the original main shore. It seems to us that it must be divided upon the same principle as the first; but, in doing it, it will be necessary to assume as the *filum aquæ* the middle line between the first island and the original river bank on that side." Where the mainland and an island have been separately surveyed and sold by the government to different parties, the grantees of the mainland do not, by such grant, acquire the island. In such case, the grant to each being separate and distinct, neither can claim beyond the calls of his entry and patent. The rule is that where there is a clear reservation of islands in a grant of mainland adjacent to a river, either expressly or by necessary implication, such islands do not pass to the grantee; and the *filum aquæ* which bounds the grant is the centre thread between the shore and the island. In such cases, two *fila aquæ* are established, one on each side of the island: *Stolp v. Hoyt*, 44 Ill. 223; *Trustees, etc., v. Dickinson*, 9 Cush. 544; *People v. Canal Appraisers*, 13 Wend. 355; *Buse v. Russell*, 86 Mo. 209.

In the case under consideration, it is clearly shown that there is a well-defined channel of the river on each side, between the mainland and the island. The grant of the mainland, therefore, would, at the most, merely extend to the centre thread of the stream between the shore and the island, so that in no event could an owner of the mainland claim an interest in the island.

Some objection is made that the evidence is not sufficient to

justify a verdict against Clossen. There is but little doubt that Mr. Wiggenhorn was the party wholly benefited by the cutting of the trees, and apparently he should be liable for the damage resulting therefrom. This question, however, cannot be determined in this action, as the motion for a new trial is joint. There is no error in the record, and the judgment is affirmed.

Woodward *v.* Short, 17 Vt. 387.

#### THINGS ATTACHED BY ART.

Things attached to land by art as a general rule become a part of the realty, unless by agreement they are to retain their personal character.

##### FIRST PARISH IN SUDBURY *v.* JONES *et al.*

Supreme Judicial Court of Massachusetts, 1851.

8 Cush. 184.

SHAW, C. J. The estate in controversy belonged to the town of Sudbury, when it was a corporation, having the functions both of a town and parish, prior to 1780; and after dividing and forming two distinct corporations, one municipal and the other parochial, the question is, to which it belongs. The general rule in this Commonwealth, to which, it is believed, the case of such double corporation of town and parish is peculiar, is, that if land is specially granted to a town, thus acting in a double capacity, either for municipal or parochial use, or if such a town specially, by vote or significant act, dedicates and appropriates a portion of its own territory to either the one or the other use, and it so remains until the separation, it will vest in the town or the parish, respectively, according as it shall have been originally so given, or subsequently appropriated to parochial or municipal uses. The difficulty usually is in applying this rule to particular cases, where, as in the present case, grants and acts are equivocal.

It appears that the original grant of this land, lying open and in common with a lot on which the meeting-house stands, and separated from such meeting-house lot by a traveled road

only, and not by any fence, was granted by one Haynes, more than a century ago, to the west precinct of Sudbury. The term "precinct," in law and in common acceptance, is used synonymously with "parish": *Inhabitants of Milford v. Godfrey*, 1 Pick. 96. The grant being to a parish, was *prima facie* evidence that it was granted for a parochial use. This would seem to be decisive but for one consideration, which is that the territory then (1740) constituting the town of Sudbury embraced a much larger surface, including another parish, since (1780) incorporated into a separate town, called East Sudbury, the name of which was subsequently changed by law to that of Wayland. The precinct of West Sudbury, therefore, at that time very nearly conformed in territory to that which, after the incorporation of East Sudbury, constituted the entire town of Sudbury. Still, however, it was not then a town. As a precinct, it had the functions of a parish only, although after the incorporation of East Sudbury the people of the same territory became a municipal corporation, and exercised the powers both of town and parish. The presumption, therefore, still remains, that the grant was made to the precinct for parish use.

Whether the corporation, after it acquired the functions both of town and parish, could have changed the appropriation of land granted to the parish, we have no occasion to decide, because we perceive no evidence of any intent to make such change. Certainly no vote to that effect appears, and we find no evidence of any decisive act. The use of it for a school-house to stand upon from 1735 to 1780 was whilst West Sudbury was a precinct or parish only, and before it became a town by the incorporation of the new town of East Sudbury. The continuance of the school-house on the same till 1798 seems to have been simply permissive, and without any act or vote; and it was then removed and placed on land of the town. The subsequent vote of the town, authorizing the replacing of the school-house on the land in question, was not a permanent appropriation to municipal use; and it seems not to have been so considered by the town, because, in eight or ten years after, and before the division of the corporation into town and parish,

the town again passed a vote authorizing the removal of the school-house to other acknowledged town land. There was no school-house or other town building upon it when the present parish was organized, by the separation of the two characters of town and parish.

The Court are of opinion that the original grant of this land by Haynes to the "precinct," impressed upon it a parochial character; that it retained that character, whilst the corporation exercised the functions of both town and parish; and that upon the separation it remained the property of the parish.

Judgment for the plaintiffs.

The case was then referred to an assessor, who made his report at the October Term, 1852, submitting to the Court the question whether the defendants had the right to remove the school-house from the premises, and if they had, assessing damages at thirty-five dollars; if they had not, then at one dollar.

*Ingalls v. St. P., M. & M. Ry. Co.*, 39 Minn. 479.

WILLIAMS REAL PROP. 13.

**The word "land" in a deed includes the fences thereon.**

MOTT *v.* PALMER.

Court of Appeals, New York, 1848.

1 N. Y. 564.

RUGGLES, J. In December, 1841, Mott conveyed to Palmer a farm of land in Columbia County by a deed containing the following covenant:

"And the said Philander Mott doth hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein clear of all incumbrance."

This action was brought by Palmer, the grantee, on the covenant in the deed, to recover the value of a rail fence which stood on the land when the deed was executed, but which did not belong to Mott the grantor. The facts were, that the fence

was erected on Mott's land in 1840 by one Brown (who owned the adjoining land), under an agreement between him and Mott, by which Brown was to fence in, temporarily, a part of Mott's land with his own, and to cut and take away the grass growing on Mott's land ; with leave to take away the fence whenever he liked. After Mott conveyed to Palmer the land on which the fence stood, Palmer removed the fence and converted it to his own use. Brown thereupon sued him before a justice for the fence and recovered, Mott being a witness on that trial against Palmer. Although the evidence to prove these facts was at first offered by Palmer on the trial of this cause in the Court below and rejected by the Court, it was afterward given by the defendant Mott.

The question now is whether in this action brought by Palmer the grantee against Mott his grantor, on the covenant of ownership and seisin in the deed, Palmer is entitled to recover the value of the fence. A grantor who executes a conveyance of land undertakes to convey everything described in his deed ; and by a covenant of seisin he assumes to be the owner of all he undertakes to convey. The deed in question purported to "grant and convey all that certain lot or farm of land situate in the town of Chatham, County of Columbia, bounded, etc., with the appurtenances," etc. The word land, when used in a deed, includes not only the naked earth, but everything within it, and the buildings, trees, fixtures, and fences upon it: *Goodrich v. Jones*, 2 Hill, 143 ; *Walker v. Sherman*, 20 Wend. 639, 640, 646 ; *Green v. Armstrong*, 1 Denio, 554 ; *Com. Dig. Grant, E.* ; *Co. Litt.* 4 a ; 2 Roll. 265. A deed passes all the incidents to the land as well as the land itself, and as well when they are not expressed as when they are. Fixtures belonging to the owner of the land, being part of the land, cannot be reserved by parol when the land is conveyed ; the deed conveys them to the grantee unless the reservation be in writing: *Noble v. Bosworth*, 19 Pick. 314. If the fence had belonged to Mott, it would have passed by his deed ; not by force of the word *appurtenances* contained in the deed, but without that word, and as part of the land. Trees, buildings,

fixtures, and fences on a farm, are corporeal in their nature, and the subjects of seisin, like the land itself of which they are regarded in the law as a part. Fences are perishable by the effect of time, and so are trees and houses ; but indestructibility is not one of the essential attributes of real estate. Fences are not only indispensable to the enjoyment of real estate, but they are, in their nature, real estate, to the same extent that houses and other structures on the land are so. A rail, before it is used in the construction of a fence, is personal property, and so is a loose timber before it is used in the construction of a house. When either is applied to its appropriate use in building a fence or a house, its legal nature is changed. It becomes real estate, and is governed by the law which regulates land, descending to the heir as part of the inheritance, and passing by a deed as part of the freehold. A fence may be easily detached from the earth, but not more easily than the stones which lie on its surface, and both are part of the land, and, therefore, it is that a building or fence belonging to the owner of the land will pass by his deed of the land without being expressed or designated as part of the thing granted.

But the earth within specified boundary lines may be owned by one man, and the buildings, trees, and fences standing on it by another. A man may have an inheritance in an upper chamber, although the title to the lower buildings and soil be in another : *Shep. Touch.* 206 ; 1 *Inst.* 48, b. And it is a corporeal inheritance : 10 *Vin.* 202. Buildings and fixtures erected by a tenant for the purposes of trade belong to him, and are removable without the consent of his landlord : *Holmes v. Tremper*, 20 *John.* 30 ; *Miller v. Plumb*, 6 *Cowen*, 665 ; *Doty v. Gorham*, 5 *Pick.* 489. *Herlakenden's Case*, 4 *Co. R.* 63, affords an instance in which one man owned the land and another the growing trees upon it. In *Rogers v. Woodbury*, 15 *Pick.* 156, *PUTNAM, J.*, in speaking of a house which a man had erected on land which did not belong to him, said " it might or it might not be parcel of the realty. If the owner of the land owned the buildings, it would be so. If he did not, and the owner of the building had no interest in the land, the

building would be personal property." *Smith v. Benson*, 1 Hill, 176, was the case of a dwelling-house and grocery belonging to one man, although standing on the land of another ; and in *Russell v. Richards*, 1 Fairf. 431, the owner of land on which another man had erected a saw-mill by his consent, executed a deed for the land and the mill, but it was held that the conveyance passed no title to the mill, because it was the property of him who built it. The conclusion derived from these cases against the plaintiff's right of recovery on the covenant is that the defendant's deed purports to be a grant of real estate only, and the fence in question being personal property was not a part of the premises granted, and therefore not within the scope of the covenant which relates to the realty only.

If this be a sound conclusion, a grantor could not be made liable on the covenants in his deed, although he had previously and privately sold, with a view to removal, all the houses, buildings, mills, fences, and growing timber on the land conveyed. Indeed, if this doctrine prevails, the gravel, clay, stone, and loam might also be converted into personal property by such a sale, and carried off the land, without violating the grantor's covenant. Let us test the correctness of this conclusion in a few words. It is true the fence in one sense was not a part of the thing granted. It did not pass by the deed. In the same sense, if some stranger had been the owner of one-half of the farm, the half would not have been part of the thing granted because it would not have been passed by the deed. But the fence was *within the description* of the thing granted as clearly as the land itself ; and being within the description, it was a part of that which the deed purported to convey, and of which the grantor covenanted that he was the owner. If it be yet doubted whether the fence (being in fact the personal property of Brown) was within the description of what the grantor professed to convey, that doubt can be solved in a moment, by reflecting that it would undeniably have passed by the deed if the grantor had been the owner of it ; although it could not have so passed if it had not been within the description.

It all comes to this : The grantor undertook to convey it as



part of the realty by a deed which would have been effectual for that purpose if he had been the owner of it, as by the deed he professed to be, but was not. It is therefore a case in which the covenant of seisin affords a remedy; and although the amount in controversy is trifling, the right is clear; and it seems to be perfectly just that the grantor should pay for the fence, because there is nothing in the case to show that Palmer, when he accepted the deed, was informed by Mott or otherwise knew that it belonged to Brown.

The judgment of the Supreme Court must therefore be affirmed.

**The rails upon the road-bed of a railway are a part of the realty.**

HUNT *v.* BAY STATE IRON COMPANY.

Supreme Judicial Court of Massachusetts, 1867.

97 MASS. 279.

FOSTER, J. There can be no doubt that the rails when laid upon the road-bed and fastened there so that engines and cars could pass over them would have become annexed to the realty, and ceased to be personal property, in the absence of any agreement changing the ordinary rule of law.

It was held in *Pierce v. Emery*, 32 N. H. 484, and *Haven v. Emery*, 33 N. H. 66, that rails delivered under an agreement that they should be laid down on a specific part of the railroad and continue the property of the vendors until a specified price was paid for them, remained the personal property of the vendors until payment, and were not, when laid, so inseparably annexed to and incorporated with the realty that they could not be removed for non-payment of the price. The agreement of the parties was held to supersede the general rule of law, and to be binding likewise upon subsequent mortgagees with notice. Notice to the trustees was held to be notice to the bondholders under such a mortgage. But without notice it was considered that the mortgagees would not be affected by a

private agreement changing the natural and legal character of the property from real to personal, but would have a right to suppose that they acquired all the incidents and appurtenances which by the general rules of law would result from such a purchase. We are satisfied with the principles and follow the authority of these cases: *Strickland v. Parker*, 54 Me. 263.

Our own adjudged cases fully support the position that the rails when laid became a part of the realty in the absence of any agreement to the contrary: *Peirce v. Goddard*, 22 Pick. 559; *Winslow v. Merchants' Insurance Co.*, 4 Met. 306; *Butler v. Page*, 7 Met. 40; *Richardson v. Copeland*, 6 Gray, 536. They likewise recognize the doctrine that buildings and other erections or fixtures so attached to the realty as to become ordinarily a part thereof may, by agreement between the parties, remain personal property: *Curtis v. Riddle*, 7 Allen, 185. Both of these propositions seem to be everywhere accepted as sound law.

Upon the question whether the character of property can be changed by agreement from realty to personalty as against a *bona fide* purchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be and by its ordinary nature is a part of the realty: *Elwes v. Mawe*, 3 East, 38; 2 Smith Lead. Cas. 99, and notes. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.

Nor do we suppose that a mortgagor in possession is competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of the rails when once laid down is determined by the law to be that of real estate. Mortgagees, as well as all other parties in interest, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver. Land-owners having a lien upon the location for their damages and

a right to take possession for default of payment, stand in the same position so long as their right remains to enforce payment by entering on the land.

Whether the mortgage of the railroad, executed before these rails were laid, but then invalid, and afterward confirmed by the Legislature, should be treated as a security prior or subsequent to the laying of the rails, will probably not prove a material question in this case. By the agreement of the parties it must be sent to a Master to ascertain all the facts as to notice; upon the coming in of his report we can more conveniently and intelligently determine whether the agreement with Mr. Slater is still capable of being enforced.

It is valid between the parties, Slater and the original corporation, but binding upon prior mortgagees and the land-owners (if they remain entitled to possession as security for their damages), so far only as they have consented that the rails shall remain personalty. It is binding upon such subsequent incumbrancers and grantees as had notice of it when they acquired title, but upon no others.

**A house erected on land of materials wrongfully taken from another will become a part of the realty on which it stands.**

PIERCE v. GODDARD.

Supreme Judicial Court of Massachusetts, 1839.

22 Pick. 559.

WILDE, J., drew up the opinion of the Court. This action is submitted on an agreed statement of facts, by which it appears that one Davenport, being the owner of a lot of land with a dwelling-house thereon, mortgaged the same to the plaintiff; that afterward he took down the house, and with the materials partly, and partly with new materials, built a new house on another lot of his at some distance; and that after the new house was completed he, for a valuable consideration, sold the last mentioned lot and house to the defendant.

There are two counts in the declaration, one for the conversion of the newly erected house, and the other for the conversion of the materials with which it was built, belonging to the old house.

The plaintiff's counsel insist that the old house was the property of the plaintiff, and that Davenport had no right to take it down, and could not therefore acquire any property in the materials by such a wrongful act; that the new house, being built with the materials from the old house in part, became the property of the plaintiff, although new materials were added, by right of accession; and that Davenport, having no property in the house, as against the plaintiff, could convey no title to it to the defendant.

That Davenport is responsible for taking down and removing the old house cannot admit of a doubt; but it does not follow that the property in the new house vested in the plaintiff.

The rules of law by which the right of property may be acquired by accession or adjunction were principally derived from the civil law, but have been long sanctioned by the Courts of England and of this country as established principles of law.

The general rule is that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England, as well as by the civil law, a trespasser who willfully takes the property of another can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species, and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another: 2 Kent's Comm. 362; *Betts v. Lee*, 5 Johns. R. 348. But there are exceptions to the general rule.

It is laid down by Molloy as a settled principle of law that

if a man cuts down the trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling-house, nay, though some of them are for shipping, and builds a ship, the property follows not the owners but the builders : *Mol. de Jure Mar.*, lib. 2, c. 1, § 7.

Another similar exception is laid down by Chancellor KENT in his *Commentaries*, which is directly in point in the present case. If, he says, A builds a house on his own land with the materials of another the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged to answer to the owner of the materials for the value of them : 2 Kent's Comm. 360, 361. This principle is fully sustained by the authorities. In Bro. tit. Property, pl. 23, it is said that if timber be taken and made into a house it cannot be reclaimed by the owner ; for the nature of it is changed, and it has become a part of the freehold. In Moore, 20, it was held that if a man takes trees of another and makes them into boards, still the owner may retake them, but that if a house be made with the timber it is otherwise.

In Popham, 38, this principle is further extended. The plaintiff in that case had mixed his own hay with hay of the defendant on his land, and the defendant took away the hay thus intermixed ; and it was held that he had a right so to do. But it was also held that if the plaintiff had taken the defendant's hay and carried it to his house and there intermixed it with his own hay, the defendant could not take back his hay, but would be put to his action against the plaintiff for taking his hay. If there be any doubt of the doctrine laid down in this case, it does not affect the present case. The doctrine laid down in the former cases is fully supported by the Year Books, 5 Hen. 7, 16 ; and I am not aware of any modern decision or authority in which this old doctrine of the English law has been controverted.

The case of *Russell v. Richards*, 1 Fairfield, 429, cited by the plaintiff's counsel, was decided on the ground that the building in controversy was personal property, and had never

become a part of the freehold. In the present case it cannot be questioned that the newly erected dwelling-house was a part of the freehold, and was the property of Davenport. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action even against Davenport for the conversion of the new house. And it is equally clear that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down that house and using the materials in the construction of the new building was the tortious act of Davenport, for which he alone is responsible.

Plaintiff non-suit.

NOTE.—As to pews in a church being a part of the realty, see *First Baptist Church v. Bigelow*, 16 Wendal, 28; *Bigelow v. Biele*, 8 Barb. 130; *Union House v. Rowell*, 66 Me. 400.

## FIXTURES.

## 1. TESTS.

As to what is a fixture, the *intention* of the party making the annexation is the prime test, this intention being inferred from the mode of annexation and the purpose for which the annexation was made.

PARSONS *v.* COPELAND.

Supreme Judicial Court of Maine, 1854.

38 Me. 537.

TENNEY, J. 1. The commission issued upon the judgment for partition under the seal of the Court. One of the persons appointed to make the division declined to act, and the Court designated another. This appears by the commission and the official certificate of the clerk thereon, and was in all respects sufficient authority to those appointed, in the discharge of the duties prescribed. The substitution of one commissioner for another did not annul the commission in other respects or impair its legal effect. After the substitution, the seal upon the commission was adopted, and applied equally to the person substituted and to those who were previously appointed and accepted the trust.

2. Another ground of objection to the acceptance of the report is that the commissioners set off and assigned to the petitioner property of which Calvin Copeland, the respondent, was sole seized in fee, and in which the said petitioner had no seisin in or possessory right.

The petitioner obtained twenty-three, of six hundred and twenty-five parts of the premises, under the levy of an execution in his favor against Calvin Copeland, on November 18, 1847. The petition for partition was presented to this Court and entered therein at October Term, 1849, in the County of Penobscot; and judgment for partition thereon was rendered at the October Term, 1852, of the same Court, and commissioners were appointed to make partition, who made their return and report on February 16, 1853, signed by them.

The case discloses, that after the levy of the execution and the filing of the petition for partition in Court, and before the interlocutory judgment, a dye-house and a dry-house with kettles and other articles therein, together with a wood-house, were erected on the premises by Calvin Copeland, for the purpose of carrying on the factory with greater facility and profit. It does not appear that the petitioner aided in the erection of these buildings, or that he consented or objected to their erection. These were taken into the estimation of the value of the premises by the commissioners, and the division made accordingly, though no part thereof were set-off and assigned to the petitioner, and the party who caused their erection is not deprived of them. But as they constituted a part of the appraised value of the whole, the value of the share set off to the petitioner was proportionately greater than it would have been if they had not been taken into the account.

If these buildings had been upon the land at the time the petition was filed, and no question had been presented in the proceedings, whether they were a part of the common property or not, the interlocutory judgment would have established the title in the petitioner to twenty-three parts of the six hundred and twenty-five, including the buildings in question. The commissioners would have had no authority to exclude any part of these buildings upon the land; and would not have been empowered to inquire whether they were erected exclusively by one tenant in common or not, with the view to disregard them in the division if it should be found that they were erected by one party alone before the filing of the petition. Under the commission they would have been bound to make division of the premises as they found them.

But the judgment for partition must be based upon the petition, and the estate therein described. It cannot include property not embraced in the petition, or which has not been added under such circumstances as to make it a part of the premises to be partitioned.

After a petition for partition has been filed in Court, and all the tenants in common of the land referred to therein have



had due notice of its pendency, if one should erect a temporary building thereon, for his own exclusive use, by the consent of his co-tenants, such building would belong to the party alone who erected it, in the same manner that it would, if placed upon the land of a stranger, under similar permission.

It cannot be assumed, from the evidence, that Calvin Copeland, being in possession of the premises as a tenant in common with the petitioner, who owned a small part only of the premises, erected the buildings in question wrongfully, so that they became a part of the common property. But from the description of the buildings and the mode in which they were attached to the ground, and the use for which they were apparently designed, according to the testimony, and the entire want of evidence that they were placed there against the consent of the petitioner, it may well be inferred that they were erected rightfully, and never became the property of the tenants in common. Consequently, it would seem to comport with the justice of the case, and with the equitable rights of all the owners of the premises, that the partition should be based upon an estimation of their value exclusive of those buildings, if it should be found by the commissioners that they were legally erected by Calvin Copeland for his own use and benefit, subsequent to the filing of the petition for partition.

For these reasons the report is recommitted.

3. Another ground relied upon against the acceptance of the report is, that the commissioners set off and assigned to the petitioner certain personal property belonging to said Copeland, to wit, machinery connected with a woolen factory, consisting of looms for weaving, carding machines, bands, water-wheel, fulling stocks and boilers, together with other personal property generally found in a woolen factory.

As the report is to be recommitted for reasons already stated, it is considered proper to discuss the question presented in the last ground of objection to its acceptance, and to decide the rights of the parties to the property referred to, so that the commissioners may be enabled to make their report in accordance with those rights.

It appears that one of the buildings upon the land described in the petition and the commission was a "woolen factory," in which were certain machines, such as are common in such a factory, consisting of cards, looms, jacks, spooler, picker and dresser, sitting upon the floor. The frames of the looms were fastened by cleats to prevent their moving. There were fastenings made *into* the floor, and the jacks and cards were fastened *to* the floor. And, as we understand from the report, this machinery was put in operation by means of water power connected with the factory.

On the question, whether such machines so situated are fixtures, so that they constitute a part of the real estate, the authorities are far from being uniform, and no rule of universal application can be deduced from them without conflicting with the doctrines found in some of the decisions upon the subject.

It was held in a leading case in England, *Elwees v. Mawe*, 3 East, 38, after much consideration, that there was a distinction between annexations to the freehold for the purposes of trade and manufacture and those made for the purposes of agriculture, and that the right of removal by the tenant of the former was much stronger than of the latter. And it may be regarded as well settled that an article may constitute a part of the realty, as between vendor and vendee, which would not under similar conditions and circumstances be so treated as between landlord and tenant: 2 Kent's Com., Lecture 35.

The same distinction exists between the rights of the heir and executor, in favor of the former; and between the tenant for life and the remainderman, or the reversioner. The rights of the mortgagee to such additions made by the mortgagor during his possession have been equally favored with those of a vendee: *Winslow et al. v. Merchants' Ins. Co.*, 4 Met. 306. The same rule will apply to fixtures under the levy of an execution as it does between vendor and vendee, passing them as parcels of the inheritance in one case as in the other: *Powell et ux. v. Manson & Brimfield Mfg. Co.*, 3 Mason, 459.

The case before us differs in some respects from the classes

of cases referred to, as this concerns the power and duty of commissioners in making division of real estate owned in common and undivided by the parties. By the judgment of partition each party is equally the owner of the premises, and has equal rights therein in the proportion determined thereby. Whatever was in the "woolen factory," situated upon the land described, and used in the appropriate business thereof, could not have been considered by the commissioners to be temporary for one party more than for the other, and therefore cannot fall within the principle applicable as between landlord and tenant. Hence it is a case where the doctrines which govern, as between vendor and vendee, are to have their most extended influence.

Still, if one party had placed in the factory certain articles, which were clearly personal in their nature, and under no rule became part of the realty, the commissioners were not at liberty to regard them in the division which they undertook to make.

It has been held necessary, in order to constitute a fixture, that the article should be let into, or united to the land, or to substances previously connected therewith: *Ames & Farrard on Fixtures*, 2. In *Walker v. Sherman*, 20 Wend. 636, it was held requisite that the article be actually affixed or annexed to the realty to become parcel thereof. By other authorities it has been regarded necessary in order to give to chattels the character of fixtures, and deprive them of that which they had before the relation to the realty commenced, that they be so firmly fixed that they cannot be moved without injury to the freehold by the process of removal: *Farrar v. Chauffette*, 5 Denio, 337.

It cannot be denied that the physical attachment of certain articles to the freehold is a very uncertain and unsatisfactory criterion. We have seen that it is well settled that the same attachment will not change the character of the article when made under one species of tenancy, when under another, with much less of a permanent connection, it will cause the article to become a part of the real estate. Millstones, the gear of the

mill, and the water-wheel to which the power is applied, and the articles connected which are universally conceded to be fixtures and to pass with the realty, may be taken from their appropriate places, without the withdrawing of a spike, a pin, or a nail, or the displacement of a cleat, their own weight often keeping them in their intended position, and no injury whatever arise to the building from which they are taken. Many articles, constituting essential parts of the most permanent dwelling-houses, and without which the buildings could not be comfortably occupied may be entirely removed with the greatest facility, and no injury be occasioned to the portions remaining.

Mr. Dane remarks: "It is very difficult to extract from all the cases as to fixtures, in the books, any one principle on which they have been decided, though being fixed and fastened to the soil, house or freehold, seems to have been the leading one, in some cases, though not the only one. Not the mere fixing or fastening alone is to be regarded, but the use, nature, and intention:" Abridg. of Amer. Law, vol. 3, p. 156.

In *Winslow et al. v. Merchants' Ins. Co.*, before cited, the Court say: "As to what shall be deemed fixtures and part of the realty, when the question does not arise between landlord and tenant, or tenant for life and remainderman, in regard to improvements made by the tenant, it is difficult to lay down any general rule which shall constitute a criterion. The rule that objects must be actually and firmly fixed to the freehold to become realty, or otherwise to be considered personalty is far from constituting such a criterion."

In *Teaf v. Hewett et al.* from the Ohio Reports, cited in the argument, where the Court came to the conclusion that machines in a factory are not parts of the realty, the learned Chief Justice, in a very elaborate opinion, says: "After a careful review of all the authorities I have reached the conclusion that the united applications of the following requisites will be found the safest criterion of a fixture. 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Applica-

tion to the use and purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the party making the annexation, the *structure* and *mode* of annexation, and the *purpose* and *use* for which the annexation has been made."

The intention is here held essential in the determination of the question, and so far the rule is not in conflict with the views entertained by the Court in 4 Met. The same Judge seems to consider the want of the first requisite as not entitled to controlling influences in all cases, for he remarks that "the doors, windows, shutters, etc., of a mansion-house may be raised and removed without any actual physical injury, either to the building or the article removed; so also in a mill with the millstones, hoppers, and belting apparatus as usually fixed in a mill, yet it has never been questioned that these articles are fixtures."

It is undoubtedly true that the second requisite quoted is important. It will not be contended that a machine fitted to be moved by water or steam power, portable in its character, when placed in a building (having such power for other and distinct objects) with the mere purpose of testing the capacity of such machine to perform the contemplated operations by the application of the power by the belts in previous use, would become a part of the realty by such experiment. Such was not the design, and such cannot be the legal effect.

But it is true, undoubtedly, that the building, the water-wheel and the gear designed for a grist-mill has peculiarities, and is often very different from the water-wheel, the gear, as well as the building intended to constitute parts of a woolen factory. And the machinery in the former, consisting of the millstones, the cleansing apparatus, the bolts, the belts with their appendages to carry the grain to the cleanser and the meal to the bolts, all of which are believed sometimes, if not generally, to be moved by means of the belts connected with the gear of the mill, together with the hoppers, the hoops,

troughs, etc., are as easily removed as are the cards, the looms, and the pickers in the latter. If the building is designed for a woolen factory, the wheels and gearing to which the motive power is applied, constructed in a manner suited to promote the intended object after the machines are placed in the building, it is only another step in the prosecution of the design; and it is not easy to understand wherein the latter fail to have the properties of the former, or how one can have distinguishing characteristics from the other, so that one is to be treated as personal property, while the other is real estate. A wheel in the gearing is moved by corresponding cogs in that wheel and the water-wheel. The wheel of a carding machine is caused to move by means of a belt connecting the wheel of the gearing therewith, or by means of another set of corresponding cogs. By what rule is it that the dividing line between the realty and the chattels shall be at one point or the other?

It is the supposed intention of a tenant for a limited time, in placing articles, which if made by the absolute owner would become part of the realty, to remove them at the expiration of his term, because such would be for his interest. This intention might be inferable, if the articles placed in a mill, which was rented for a term less in duration than that of the supposed existence of the articles themselves. But when the same articles are placed therein by the owner of the mill to carry out the obvious purposes for which it was erected, and which are in all respects suited therefor, and may be unsuited for another mill, it is difficult to see the reason of the proposition that these articles are still chattels in the hands of him who is the common owner of all, when in fact they are more permanently attached to the freehold than many things universally admitted to be parcel of the realty.

This Court have repeatedly held that certain articles, not differing materially in their general character in reference to the question which we have considered, ceased to be personal property when used in connection with the real estate for the purpose designed in an appropriate manner: *Farrar v. Stack-*

pole, 6 Greenl. 154; *Trull v. Fuller*, 28 Me. 545; *Corliss v. McLagin*, 29 Me. 115. No reason is perceived for withdrawing the present case from the doctrines of those previously decided, especially as authorities in other States fully sustain the views here taken, although in others, Courts of the highest standing have come to different conclusions.

Report of the commissioners recommitted.

*Teaff v. Hewitt*, 1 Ohio St. 511; *Quinby v. Manhattan Club & Paper Co.*, 24 N. J. Eq. 260.

### TESTS APPLIED.

**Barracks and hospitals erected upon a public common for military purposes were held not to be a part of the realty.**

### MEIGS'S APPEAL.

Supreme Court of Pennsylvania, 1869.

62 Pa. St. 28.

AGNEW, J. The plaintiffs' bill evidently proceeded on the ground of title. Its purpose was to restrain the agents of the United States from removing the buildings erected on the public common of York for military barracks and hospitals. These structures being put up by the United States for military purposes, and built of their own materials, the title to the materials must have been lost to the United States and vested in the plaintiffs before an injunction would be issued to restrain their removal. Hence the plaintiffs assume that, by the act of the United States, the buildings were annexed to the freehold, and thus the title to the materials passed out of them, and vested in the borough of York as trustees of the title to the common. The buildings were chiefly set upon posts let into the ground, and, therefore, the argument of the plaintiffs maintains that the question of fixture or not a fixture depends, not on the character of the foundation, but always on the question whether it is let into the soil. This is the old notion of a physical attachment, which has long since been exploded in this State. On the contrary, the question of fixture or not depends on the nature and character of the act by which the

structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. This subject has been so fully discussed in the recent case of *Hill v. Sewald*, 3 P. F. Smith, 271, it is unnecessary to repeat what is there said.

The true question then is, Were these structures of the government incorporated into the realty? We think they were not, and this is manifested by the entire character of the transaction, and the attending circumstances. And in the first place it was not the intention of either party that they should be annexed to the freehold. Evidently the authorities of the borough of York cannot be presumed to have so intended. The grant from the proprietors of Springettsbury Manor to the burgesses and inhabitants of York of twenty acres of land was—"to be kept as an open common forever for the use of said borough, and to and for no other use, intent, or purpose whatsoever." The borough authorities had no power to assent to such erections as permanent fixtures, and it was, therefore, clearly their duty to prevent their erection, if intended as such. Having made no objection and taken no steps to prevent it, they are entitled to the more favorable construction of their acts, that they knew and believed they were only temporary structures for a casual purpose.

As to the United States, the emergency and all the acts and measures of the government show that these were not permanent buildings, to be occupied at all times, but were mere temporary structures, to be used during the continuance of the war or so long only as the necessities of the government made this location convenient for military purposes. It is very evident the United States intended no annexation to the freehold.

The nature and character of the structures are also to be considered. They were not improvements made for objects connected with the soil—neither intended to give value to it nor to receive value from it. Their purpose was not different from that of the tents spread for the accommodation of the army, or its board huts used for winter quarters, the only real



difference being that these structures were intended for greater comfort, and a longer occupancy of the location.

The act is distinguishable from that of an ordinary trespasser. There was no intent to improve the ground, or to make it accessory to some business or employment. It was not an assertion of title in the soil, or of an intention to hold an adverse possession. Indeed, there was not a single element in the case which characterizes the act of a tort-feasor, who annexes his structure to the freehold, and is therefore presumed to intend to change the nature of his chattel and convert it into realty, and thereby to make a gift of it to the owner of the freehold. Neither the borough nor the United States looked upon the act in that light. The United States intended no dedication of the materials to the borough, and the borough expected none.

Herein it is that in equity the same principles apply that lie at the root of an estoppel. It is not estoppel in the ordinary sense which prevents an owner from claiming his own property, because he has done that which shuts his mouth to declaring his title. These materials never were the property of the borough, and, therefore, as owners, they had no title to be estopped of. But the borough, by lying by and suffering the United States to put up the structures without objection, on a public common, where, as permanent buildings, they would be nuisances, is estopped from declaring that the United States intended to annex their chattels to the freehold—from asserting that they were mere tort-feasors, to be treated as presumptively dedicating their property to the public. This, however, is the pivot on which the right to an injunction turns. The plaintiffs must convince us that in law and equity the United States have lost their title, notwithstanding neither party intended there should be a gift of the chattels. They must stand in the attitude of one entitled in equity to appropriate these structures, and of whom it must be said he has done nothing to mislead or to encourage a belief that he has assented to the act. A license to use the land of another temporarily may be inferred from circumstances. Thus, a neighbor who enters to pay a visit cannot be treated as a trespasser. So a guest who enters an inn,

or one who moors his vessel at a private wharf, to do business with the owner. And even a permanent right to the use of structures built on the land of another with his assent, may be acquired by the expenditure of money and labor: *Lefevre v. Lefevre*, 4 S. & R. 241; *Rerick v. Kern*, 14 S. & R. 267. And it is said in *Cook v. Stearns*, 11 Mass. 533: "Licenses to do a particular act do not in any degree trench on the policy of the law which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than *an excuse* for the act which *otherwise would be a trespass*." See also notes to *Rerick v. Kern*, 2 Am. Lead. Cases, 514. There is nothing in the case to show express license, but the circumstances bear strongly on the silence of the plaintiffs when they should have spoken out. The United States were engaged in a gigantic war, requiring all its means and the encouragement of all good citizens to suppress the opposition to their welfare and authority. Troops were constantly required to be raised and disciplined. York was within the theatre of war, and needed protection, the enemy coming up to her very door. Battles were fought near by, and none more than the citizens of York needed that the government should use all the means and appliances of war to preserve their lives and property. Can it be tolerated that now, when the enemy is defeated, and war is no more, that these citizens should claim the very property the government had used as a part of the means necessary to their protection? If equity has a conscience, it must revolt at this return for the services thus rendered by the common government.

This is an application to a Court of Equity to use the arm of the law to restrain an unlawful act, on the ground that the removal of these buildings is an irreparable injury. But surely this is not such a case. There is not any evidence that the United States have dedicated this property to the citizens of York, or that they have done any act which can justly forfeit their title to the property; and it is not the province of a Court of Equity to enforce penalties and forfeitures. It is not necessary to invoke the power of eminent domain in this case, or

any doctrines of necessity to override the rights of property. Equity will not interfere in such a case independently of these considerations.

The *pro forma* decree of the Court below is reversed, and the plaintiffs' bill is dismissed at their costs.

Lake Superior Ship Canal Ry. & Iron Co. v. McCann *et al.*, 48 N. W. Rep. 692.

**Buildings erected by the tenant on leased premises are a part of the reality if erected with that intention.**

LINAHAN v. BARR.

Supreme Court of Connecticut, 1874.

41 Conn. 471.

CARPENTER, J. The sole question in the first case is, whether a tenant who erected a building on leased property had a right to remove the same at the termination of his lease. The circumstances were these: The premises consisted of a store in the city of Bridgeport. The store burned down, leaving a vacant lot. The lease had then about two years to run. The landlord offered the tenant fifty dollars to surrender his lease, but he declined, saying that he was about to erect another building on the land, that he knew that it would belong to the landlord, that he did not intend to remove the same at the expiration of his lease, and that the rent which he should receive during the term would pay the cost of construction. The building was one story high, built of brick, with glass front, and stood on the foundation walls of the burned building, except the rear, which was an unbroken brick wall from the cellar bottom.

The respondent claims under the lessee, and insists that the building was a trade fixture which might lawfully be removed by the tenant.

A question is made whether the declarations of the tenant were admissible in evidence. We entertain no doubt on that question. They tend directly to show the intention of the party in erecting the building; and intention in these cases is

always a material inquiry. Had the parties agreed that the tenant might build and remove the building, no one would doubt that that fact might be shown for the purpose of proving that it was the personal property of the builder. The intention and understanding of the parties at the time are necessarily involved in the inquiry.

In this case it is apparent that both parties intended that the building, at the termination of the lease, should belong to the owner of the land. This is evident, in the first place, from the materials used, and the manner of construction. It was attached to the freehold in the same manner that buildings ordinarily are which are designed to be permanent. This, although not conclusive, is an important consideration. In the next place, the interview between the parties at the time very clearly shows that neither party expected or intended that the building should be removed. In view of all the circumstances we think the Court below was clearly right in holding that the building was a part of the realty: *Ombony v. Jones*, 19 N. Y. 324; *Shepard v. Spalding*, 4 Met. 416; *Curtis v. Hoyt*, 19 Conn. 154; *Landon v. Platt*, 34 Conn. 517; *Capen v. Peckham*, 35 Conn. 88.

The second case was a summary process to recover the possession of the leased premises. The only question before the Justice seems to have been whether the plaintiff in error, who claimed the building by purchase from the original lessee, was the lessee of the complainant. The Court found that he was, and rendered judgment against him.

We fail to discover any question of law in the case which this Court can review.

The defendant claimed that the occupation of the premises while he was claiming the ownership of the building and while the injunction against his removal of it was in force, was not an acceptance of a proposition by the plaintiff to lease the premises to him at a certain rent named. The Justice found that he had become a lessee of the premises—that is, that his conduct was such an acceptance.

This was a question of fact. But even if it can be regarded

as a mixed question of law and fact, we cannot see that the Justice violated any principle of law in deciding as he did.

There is no error in either judgment.

**The intention of the party at the time he erects the building governs, and not a subsequent intention.**

DOOLEY *v.* CRIST.

Supreme Court of Illinois, 1861.

25 Ill. 551.

WALKER, J. Appellee claims the building in controversy under his purchase, at the constable's sale, on the execution against Whitelock and Philips. On the contrary, appellant claims it as a part of the real estate of which he was the owner. This then involves the inquiry whether it was real or personal property. It is a fundamental rule that real estate embraces lands, tenements, and hereditaments. All improvements or additions of a permanent nature and adapted to its use and better enjoyment, placed upon land, are regarded as forming a part of the land. To this rule there are the exceptions of trade fixtures, which cannot have any application to this case. By express agreement between the parties, erections placed upon the land by the tenant during the term may be removed as personal property; or if the owner of the soil were by deed to sell a tenement erected upon the land, it would no doubt become dissevered, and converted from real to personal property. But as a general rule, when a building is erected on land, the presumption is that it is a part of the real estate and not personal property, and to take it out of the operation of the rule, a state of facts must be shown which rebuts the presumption. Even when a stranger constructs a building upon the land of another, without his consent, it becomes a part of the land, and he would become a trespasser by removing it.

This record affords no evidence from which it can be inferred that the appellant, who was the owner of the soil upon which this building was erected, ever consented that it might be

removed. He had contracted to sell the land to Mrs. Philips, but that agreement was afterward rescinded, and when the contract was abandoned by the parties, appellant became undeniably the owner of the land and its improvements, but in law and equity, as no reservation seems to have been made of the house or other improvements. When Whitelock agreed with Philips for the purchase of the acre of land upon which the house was built, and which was embraced in Mrs. Philips' purchase, there seems to have been no reservation or agreement for the removal of the house in any event. Whitelock gave an acre of the land, purchased of appellant, in exchange for the acre upon which the house was erected, and they each entered into possession of the portion thus received in exchange, and so continued until their several contracts were rescinded or abandoned, neither having paid for the land purchased of appellant. This building was a part of the improvement connected with Whitelock's purchase, and it must have been made with the design of permanently remaining on the land, and not for any temporary purpose.

If the intention of Whitelock was to render the improvement permanent when erected, there can be no question that it became a part of the freehold, and no subsequent change of intention changed its character to that of personal property, rendering it liable to levy and sale on an execution from a justice of the peace. The intention at the time to render it a part of the realty fixed its character beyond all dispute, and that character could not be changed by anything short of its severance by removal or by an executed agreement for that purpose. The mere change of the intention of the owner cannot have that effect. This principle was announced by the first of appellant's instructions, in the series which the Court refused to give, and it should have been given. The Court below having erred in refusing to give that instruction, the judgment below must be reversed, and the cause remanded.

Judgment reversed.

The intention to reduce the chattel to realty should positively appear.

HILL v. WENTWORTH.

Supreme Court of Vermont, 1856.

28 Vt. 428.

BENNETT, J. This is a case of very considerable practical importance, and we have endeavored to give it the attention which its importance demands. The charge assumes that, if the machinery in the mill was necessary and usual for the purpose of manufacturing paper, and designed to be and remain in the mill permanently, it became a part of the realty, however slightly it may have been attached to the freehold. There are, no doubt, cases in the books which will fully warrant the charge of the Court, and of that character is the case of *Farrar v. Stackpole*, 6 Greenl. 157, to which we have been referred (and which seems to be an extreme case), while others take an opposite view, and hold that the *annexation* must be substantial, and such that the chattel cannot be severed without substantial injury to the freehold, beyond what shall result from the abstraction of the thing removed. The first inquiry should be, what has been the tendency of our own decisions in relation to the matter?

In *Wetherby v. Foster*, 5 Vt. 136, it was held that potash kettles, set in brick arches, in the usual manner, with chimneys to the arches, and used in manufacturing purposes, still remained personal property. The Court said, p. 142, if the kettles were fastened to the freehold at all, it was temporary merely, and the injury to the brick-work, in taking them out, *was too trifling to designate them real estate while there*. In *Tobias v. Francis*, 3 Vt. 425, the question arose between the mortgagee and a creditor of the mortgagor, and it was held that carding machines, in a woolen factory, and connected by a band with other wheels in motion, by which they were propelled in the usual way, and which remained stationary by means of their own weight, were still personal property, and, as such, might be attached and taken away.

In *Sturgis v. Warren*, 11 Vt. 433, the question also arose be-

tween the creditors of the mortgagors and the assignee of the mortgagee, and the carding machines were affixed to the factory building in the usual manner, *some with nails, some with spikes and screws, and some with cleats*, and yet, upon the authority of the case of *Tobias v. Francis*, they were held to be personal property. In *Cross v. Marston*, 17 Vt. 534, the case of drawers, and the sash case were placed in a building which was fitting up for a book store. The case of drawers was nailed to the wall, and open shelves were placed in the space above. The sash of the show-case was used to cover an open book-case, which was permanently fastened to the wall of the building—the sash sliding in a place before the book-case, and being fastened in by strips of boards nailed above and below. The question arose between vendor and vendee, and the case was made to turn on the question whether the chattels had, by the manner of their *annexation* to the freehold, lost their *personal identity as chattels*, and it was held that they had not, the Court applying, *as a test*, the fact that the articles could have been taken out of the building without injury to themselves, or the building, which was assumed both by the counsel and the Court, although, from the report of the case, I do not see that it was a fact distinctly found in the bill of exceptions. From the cases already decided in this State, upon a subject which, from its very nature, is perplexing, and rendered more so by the conflicting views of different Courts, it is quite evident our Courts have assumed the ground that a chattel is not to lose its personal identity, as such, unless it has been substantially annexed to the freehold, in a manner which would not permit it to be separated from it, without material injury to itself or to the freehold. We apprehend there is no sufficient reason why we should, at the present day, recede from the ground already taken by our Courts. It is certainly sustained by many well-considered cases.

In *Swift v. Thompson*, 9 Conn. 63, the spinning frames in a cotton factory stood upon the floor, and were kept in their place by means of cleats nailed to the floor around them, and there was other machinery, to the posts of which iron plates



were attached, through which wood screws passed, fastening them into the floor, but by unscrewing them the machinery could be removed without injury to it or the building, and it was held that the whole machinery remained personal property. DAGGETT, J., says it is material to consider that the machinery was thus attached to the building to render it stable, and that the criterion established by the rules of the common law is, *could this property be removed without injury to the freehold?* See, also, *Taffe v. Warwick*, 3 Blackford, 111. The New York cases are very full on this point: *Cresson v. Stout*, 17 Johnson, 116; *Walker v. Sherman*, 20 Wend. 636; *Farrar v. Chauffetete*, 5 Denio, 527, and *Vanderpool v. Van Allen*, 10 Barbour, 157. So in a recent case in Ohio, *Teafft v. Hewett et al.*, 1 Ohio N. S. 5-11, where the subject was examined at great length, and with ability, it was held that the machinery in a woolen factory, connected with the motive power of the steam engine by bands and straps, and only attached to the building by cleats or other means to confine it to its proper place for use, and could be removed without injury, was but chattel property. The case of *Gale v. Ward*, 14 Mass. 352, in its facts, is much like the case of *Tobias v. Francis*, in our own reports. In that case, PARKER, C. J., says, *though in some sense attached to the freehold, yet they (the machines) could easily be disconnected, and used in buildings erected for similar purposes.*

Upon the subject of fixtures, in the English law, the case of *Elwes v. Mawe*, 3 East, 38, and reprinted in Smith's Leading Cases, may well be considered *the leading case*. In that case, and in the notes to it by Mr. Smith, and the American editor, most of the law on that subject is collected.

In a case decided in the Court of Exchequer, in 1851, *Hellawell v. Eastwood*, 6 Welsby, Hurlstone & Gordon, 295, it was held that machinery, consisting of certain cotton spinning-machines, some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into them, were still personal property. B. PARK said the only question was, whether the machines, when fixed, were a parcel

of the freehold, and this was a question of fact depending on the circumstances of each case, and principally on the two considerations, first, the mode of annexation to the soil or fabric of the house, and the *extent* to which it was united to them, whether it could be easily removed without injury to itself or the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*.

He added, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal, without the least injury to the fabric of the building, or to themselves; and the object and purpose of the annexation was not to *improve the inheritance*, but merely to render the machines steadier and more capable of convenient use, *as chattels*. In that case, it is true, the question arose between landlord and tenant, and in such a case, it is said in the English law, the greatest indulgence is shown to the tenant, where the annexations are made for the purposes of trade or manufactures. No doubt in England, in relation to fixtures, different rules have been held to prevail; and between heir and executor, a strict rule has been adopted, and the same rule seems to have prevailed between vendor and vendee, and between mortgagor and mortgagee; and the English cases show that there is no relaxation of the rule, as applied in these latter cases, even between landlord and tenant, where the erections are made *solely for the purposes of agriculture*, although beneficial and important in improving the occupancy of the estate. We apprehend that much of the confusion in the authorities upon the subject of fixtures, may have had its origin in the fact that different rules have been attempted to be applied to different relations, and these different relations have sometimes been lost sight of.

It is said by COLLAMER, J., in *Sturgis v. Warren*, 11 Vt., that "in this State, and especially under our attachment law, it is difficult to recognize any such distinction."

In *Dubois v. Shelley et al.*, 10 Barb. 496, it was held the

same rule should be applied, as to fixtures, whether the erections were for agriculture and other purposes, or for the purposes of trade, and between landlord and tenant.

In *Van Ness v. Pacard*, 2 Peter's U. S. R. 145, it is strongly intimated that, in this country, there should be no different rule applied, whether the erections were made for *the purposes of trade and manufactures*, or purely for *agricultural purposes*.

We think the rule in this State should be that the various articles of machinery belonging to a manufactory are, in no respect real estate, excepting as they are a part of the freehold, or substantially attached to it, and that it is not sufficient to make them a part of the freehold if they are attached to the building for the purpose, and in the manner adapted to keep them steady, and that their use may be more beneficial as chattels, and in such a way that will admit of their removal without any material injury to the freehold, or to the chattels. Neither is it enough to make them real estate that they are essential to the occupation of the building for the business carried on in it. In the construction of a building, many things, which in themselves are chattels, as doors, window-blinds, shutters, etc., become a part of the building, and, in such cases, the manner of annexation is of no particular importance. But to make the *test*, whether fixture or no fixture, to be found in the relation which the chattel bears to the use of the freehold, is, to us, unwise, and against well-considered cases. The rule requiring *actual annexation* is not affected by those cases where a *constructive annexation* has been held sufficient. Those cases may be regarded as exceptions to the general rule, or else as cases where the *things* were *mere incidents* to the freehold, and became a part of it, and passed with it, upon a principle different from that of its being a fixture.

In determining the character of what the plaintiff claims to be *fixtures*, or a part of the realty, we must not only have reference to the manner and extent of the annexation, but also to the *object* and *purpose* of it. Whether the articles in question were personal property, or *fixtures*, should be determinable, and plainly appear, from an inspection of the property itself, tak-

ing into consideration their *nature*, the *mode* and *extent* of their *annexation*, and their purpose and object, from which the *intention* would be indicated. \*

To change the nature and legal qualities of a chattel into a fixture, requires a positive act on the part of the person making the annexation, and, his intention so to do should positively appear, and, if this be left in doubt, the article should be held still to be personal property.

We see no reason why the case of the potash kettles, in 5 Vt., should not govern this, as to the iron boiler. It was set in a brick-work, resting upon a stone foundation placed upon the ground, and the floor of the building was simply laid up to it, and it was in no other way attached to the building. So in *Hunt v. Mulanphy*, 1 Missouri, 508, a kettle and boilers put up in a tannery, with brick and mortar, was held not to be a fixture. See also, *Reynolds v. Shuler*, 5 Cowen, 323, and *Raymond v. White*, 7 Cowen, 319, which was the case of a heater used for applying heat to tanners' bark, in vats and leaches.

We think the four engines, used for grinding rags into pulp, cannot be regarded as a part of the paper-mill, or as annexed to it, so as to become a part of the realty. These were fixed in large oval tubs, in the usual way, the tubs standing on timbers, and the floor of the building scribed up to them, and the engines were carried and operated by means of a band connecting them with the iron shafting from which was communicated to the engines their *motive power*. There can be no ground to claim that the tubs in which they stood were a part of the realty, and the band was used to give the engines motion, and not for fastening them to the freehold. It could be slipped off, and put on, to give them motion, or arrest it, at the will of the operator, and they could be removed without injury to the building, or the engines. The case of *Winslow v. Merchants' Insurance Company*, 4 Met. 306, where it was held that a steam engine and boilers, and the machines for working iron, upon which they operated, were fixtures, and a part of the realty, is expressly put, so far as relates to the machines for working iron, upon *the manner* in which they were *fitted and*

*adapted to the mill.* The words "fitted and adapted to the mill" seem to imply something more than being set down upon the floor, and fastened for convenient use, but rather a peculiar adaptation and fitting to that particular location and mill. The building was a machine shop, and the steam engine furnished the *motive power* which moved the whole machinery in the several stories of the building, by means of connecting bands or otherwise. In regard to the case of *Gale v. Ward*, 14 Mass., C. J. SHAW, in 4 Metcalf, observed, "we do not think that an authority opposed to this opinion, because it is manifest that the Court, in that case, regarded the carding machines, though ponderous and bulky, as essentially personal property, which might have been attached and removed as the personal property of the owner, even though there had been no mortgage, and they had been erected by the owner in his own mill, for his own use." Besides, so far as the steam engine is concerned, it may be said of the case in 4 Metcalf, it furnished the *motive power* for the whole building, and may be regarded as an appurtenant to the machine shop, as much so as the water power of a grist-mill, or a paper-mill. The paper presses were kept in their places by means of cleats at the top, nailed to the floor, and at the bottom by iron screws, and by taking off the iron nuts they could be removed without injuring or disturbing the building.

In regard to the iron frame in which the calendar rolls stood, it seems that was simply kept in place by means of screws at the toes of the frame, connecting it with timbers upon which it stood, and the timbers made fast to the floor by means of spikes. This could be easily removed by unscrewing the toes of the frame. The rag-cutter stood in a wooden frame, standing on the floor, and was not otherwise confined.

The trimming press was set also in a frame, and this only screwed to the floor.

The machine for making paper was kept in place by means of cleats around it, nailed to the floor, and not otherwise fastened to the building. If we regard the iron boiler as personal property, most clearly the iron pipes connected with it.

only by screws and bolts, which the case says could be easily taken off, should be regarded in the same light.

The iron shafting put up in the building for the purpose of turning and putting in motion the machinery, by means of hangers of iron bolted to the beams and sills of the building, we are disposed to regard as a constituent part of the mill. The shafting was necessary to communicate the *motive power* to the machinery, and should be regarded as part of the mill, as much as a water-wheel, by which a water-power is called into existence.

Though the paper-mill was placed upon the premises subsequent to the execution of the mortgage, yet it would inure to the benefit of the mortgagee, and also carry with it all that can be regarded as incident to, or a component part of the mill, but the machinery and articles which the mortgagors placed in the building, to be used by them in their business as manufacturers of paper, and not permanently attached to the building or freehold in such a manner that they could not well be removed without material injury to the chattel or freehold, did not lose their personal identity as chattels, and become a part of the realty. This, we think, has long been the views of our Courts upon this subject.

The result will be that, so far as the irons in question either constituted the whole, or were a part of the machinery, of *such a description and character*, they remained the personal property of the mortgagors, after the fire, the same as the machinery was before the fire, and the plaintiff's right of recovery should have been limited at least to the value of the iron which was used in construction of the building, such as nails, spikes, etc., and the iron shafting used for the purpose of putting and keeping the machinery in motion, and such iron, if any, as was permanently fixed or fastened to the building so as to be annexed to and become a part of the realty, according to the foregoing views.

Whether it was of any importance that the plaintiff should have taken the actual possession of these irons, after the fire, so as to perfect and keep good his title, as against the creditors

of the mortgagors, is a point not made in the case, and one which we have not considered, and much less decided.

Judgment reversed and cause remanded.

**The use of the thing annexed in some cases strongly indicates the intention of the party making the annexation.**

**FIRST CONGREGATIONAL SOCIETY OF DUBUQUE v. FLEMING.**

Supreme Court of Iowa, 1861.

11 Iowa, 533.

WRIGHT, J. When a party has, by his own tortious act, severed an article from the realty, which but for such severance would be real property, replevin will lie for its recovery. Such act, however, will not have the effect of making the property liable to execution, if it was before exempt. The only question in this case, then, is whether the property in controversy was, at the time of the seizure by defendant, exempt from execution. And it is admitted that it was so exempt if it was so attached as to constitute and become a part of the realty.

The general rule is as stated by appellant and found in Am. & Fer. on Fixt. 3, "that to constitute a fixture in its strict sense there must be a substantial and permanent annexation to the freehold itself, or to something connected with the freehold." And exceptions contravening the spirit and policy of this rule should not be favored. The character of the article—that is, whether it is a fixture or personal property—must, however, very often be determined from a knowledge of the purpose designed in its erection or connection. As is said in *Snedeker v. Warring*, 12 N. Y. 170, the connection of the article "with the land is looked at principally for the purpose of ascertaining whether the intent was that it should retain its original chattel character, or whether it was designed to make it a permanent accession to the land." Thus while a bell, belonging to a religious society, if left upon the ground or placed in the building, without use, might in no sense be so far of the

realty as to be exempt from execution as a part thereof, yet if placed in a frame on the church lot, and used, it would be exempt, though the posts of the frame were not let into the ground. The placing it in this position and this use indicate unmistakably the intention of the society to affix it to the realty, to render it a permanent accession to the land; to appropriate to the purpose designed, and to divest it of its original chattel character. And though it be admitted that the mere intent to thus convert it without some act would not be sufficient, yet the act and use indicate the intention, and have the effect of changing the character.

In our opinion the verdict was warranted by the testimony, and there was no error in overruling the motion for a new trial.

### ANNEXATION.

Actual and permanent annexation of the thing was formerly regarded essential, but in many cases not so now.

STRICKLAND *v.* PARKER.

Supreme Judicial Court of Maine, 1866.

54 Me. 263.

KENT, J. The plaintiff's title to the property which is the subject of this action of trover depends upon a levy on real estate made by them. At the time of the levy, there was on the land a marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear, wheels and ship cradle, all being a part of the railway, forming its entire superstructure. The railway was made in the usual mode in constructing such works, by sleepers laid on the ground; the chain and cradle forming a necessary part of the railway.

The first question is whether the railway passed by the levy, or whether it was personal property so disconnected from the realty that it could only be seized and sold as a personal chattel.

The same principles of construction apply to a levy as to a deed, in determining what passes by the language used: *Waterhouse v. Gibson*, 4 Greenl. 230; *Winslow v. Mer. Ins.*



Co., 1. Mass. 316. This is also the rule in New York and Pennsylvania. The same rule applies to fixtures under a levy as under a deed, and an article may constitute a part of the realty, as between grantor and grantee, when it would not, under similar circumstances, be so treated as between landlord and tenant: *Powell et ux. v. Munson M. Co.*, 3 Mason, 359; *Parsons v. Copeland*, 38 Me. 537.

The levy in this case refers to the railway as part of the real estate appraised, and the debtor had its value allowed to him. Did it pass by the levy?

It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness; and that is that no general rule, applicable to all cases, and to all relations of the parties, can be extracted from the authorities.

There has been a manifest tendency to divide this class of cases, and to apply very different rules, according to the relations of parties to each other. A rule which is prescribed for the case of a landlord and tenant is rejected as between grantor and grantee. And this distinction is observed in the case between mortgagor and mortgagee, and again modified as between the heir and the executor.

The fact of actual and permanent annexation of the thing, personal in its nature, to the freehold, was formerly regarded as essential. But this has been found to be unsatisfactory and not fitted to meet the requirements of the law, when fixing a rule of general application, and has been abandoned as an absolute test: *Fay v. Muzzy*, 13 Gray, 56; *Winslow v. M. Ins. Co.*, 4 Met. 314.

Where there are no qualifications arising from the relation of the parties to each other, the question whether any erection is a fixture, and passes by deed or levy, must be determined upon the general doctrines of the law applied to the particular facts. The case of *Parsons v. Copeland*, 38 Me. 537, contains a full discussion of the general subject, and settles the

law in this State so far as its doctrines are applicable to the case before us. The marine railway, which is the subject of this suit, was laid on the earth, and was in fact affixed thereto. Indeed, the soil made an important and indispensable portion of the erection. The structure did not merely rest upon the earth, as a basis and support to a building or superstructure, which was not otherwise dependent on or indebted to the earth except as it upheld it in its place. The road-bed, so far as one was required, is made of and by the earth. Independent of the solid earth the superstructure, in itself alone, had no strength or substance required for the work to be performed. A railway consists as truly of its earth bed as of its rails and sleepers. The soil is thus a part of the whole, and not merely a resting place for a foundation on which are reared works perfect in themselves, and requiring nothing of the earth in their workings—as a factory with its machinery and wheels and belts.

It is regarded as one of the indications that the thing in question is a fixture, that it appears, from the whole case, that such was the intention of the owners of the soil who erected it. This point is stated in the case of *Parsons v. Copeland*, and is thus explained and enforced in the case of *Snedeker v. Warring* (a recent and leading case), 12 N. Y. 170: "A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the land."

The facts agreed to in this case, we think, clearly indicate an intention to annex the railway to the soil, and to change whatever of a chattel nature belonged to any portion, and to make it a permanent accession to the land so long as it existed.

It is the permanent and habitual annexation, and not the

manner of fastening, that determines when personal property becomes a part of the realty : *Luff kin v. Griffiths*, 35 Barb. 58 ; *Wall v. Hurd*, 4 Gray, 271.

The Supreme Court in New York had before them the question of what constitutes fixtures, as applied to a railroad, in the case of the *Farmers' Loan & T. Co. v. Hendrickson*, 25 Barb. 488. The exact point in controversy, in that case, was whether the locomotives and cars and the rolling stock were real or personal estate, and whether they would pass by a deed executed and recorded as a deed of real estate. The Court held that they did pass as fixtures, or real estate, by such deed. Whatever doubts we might entertain on this point, we cannot hesitate in assenting to the first proposition laid down by the Court, that "the road-bed, the rails fastened to them, and the buildings at the depots, are clearly *real property*." Indeed, no one in that case questioned this.

If we look at the numerous cases to be found in the reports we shall find in the instances in which the question of fixtures has been raised, that the principles on which they were decided to be such, and the nature of those erections confirm the view we have taken—that this marine railway was, with its necessary appendages, a fixture and passed by the levy : *Blethen v. Towle*, 40 Me. 310, a cistern above ground, on blocks ; *Bliss v. Whitney*, 9 Allen, 114, platform scales ; *Bishop v. Bishop*, 11 N. Y. 123, hoop poles ; *Snedeker v. Warring*, 12 N. Y. 170, before cited, a statue of Washington and sun-dial. In all these cases they were held to be fixtures.

Fixtures annexed by the owner of the land to real estate pass by sale or levy as real estate : *Bliss v. Whitney*, 9 Allen, 114. And so of necessary appendages, fitted and prepared to be used with real estate : *Farrar v. Stackpole*, 6 Greenl. 154 ; 1 Greenl. Cruise, 41, § 7.

This railway and appendages passed to the plaintiffs by levy as real estate. They now bring this action of trover for its conversion as personal property. It is objected that, if it passed as real estate, *this* action cannot be sustained.

The levy was on twenty-three-sixtieths, in common. The

plaintiffs then became tenants in common with Cushing and others, who owned the remainder. Cushing, who had the general oversight of the business, sold the whole railway to the defendant, who thereupon took the whole up and removed it to another town, across the river, and there made a new railway out of the materials, on his own land.

We can find no authority in Cushing to sell the whole. He was at best but a co-tenant, having a general oversight, but without any authority, express or implied, to sell anything more than his own undivided interest. By the purchase, if of any validity, the defendant only became a tenant in common of an undivided portion.

If property before it was detached was a fixture, the person having title to the realty can sue for the recovery of the thing itself, after it had been detached as personal property: *Luffkin v. Griffiths*, 35 Barb. 62. *Riley v. Boston Water Power Co.*, 11 Cush. 11, which was an action for the value of certain loads of gravel, taken wrongfully from the plaintiff's land and sold by the wrong-doer to the defendants, who bought in good faith. The action was sustained: *Phillips v. Brown*, 7 Gray, 26.

The common case of trees severed from the freehold and converted, which are always regarded as personal property, is another illustration of the general rule.

But it is further contended that there has been no such interference with the property as will enable a co-tenant to maintain trover. It is urged that here has been no destruction of the common property, and the counsel for the defendant cites and relies upon the conclusion, drawn from the authority (as he understands it) in 2 Greenl. on Ev. 699—"that, to maintain the action, there must be either a destruction of the common property, or something equivalent to it, and that where the thing substantially exists, within the reach of the party, the tenancy in common remains unchanged."

Admitting that this is not too strongly stated, we do not understand that by destruction is intended a physical destruction by burning or other means, so that nothing of the materials remains. But it means that the thing owned in common

is no longer that thing, but something else, and cannot be used or possessed by the parties as before. The rule, however, as stated, has other qualifications. Anything equivalent to destruction is equally effective. And further, if the thing is so changed that it is no longer the same thing, or if removed, and put into such a condition that the co-owner cannot avail himself of his right, but the same is out "of his reach," the thing, as to him, is destroyed, within the meaning of the rule.

In this case the whole structure was taken up and removed to another town, and the materials used to construct a *new* railway on land of the defendant. The plaintiffs had no property in this new railway. They had no interest in the land and no right to enter upon it. The defendant assumed the entire right and ownership, and this was what he bought. The thing no longer existed so as to be within the reach of the party. The plaintiffs' rights were as effectually destroyed as if the whole materials had been burned.

We have no doubt that these admitted facts make out a clear case of conversion by a co-tenant, within the strictest rules that have ever been promulgated.

It has been decided in this State that a co-tenant can maintain trover against another co-tenant, who has claimed to own and assumed to sell the whole of the common property, and that these facts are sufficient evidence of conversion (33 Me. 347), or, when he has by his acts caused the destruction of it: *Ib.* To the same point, *Weld v. Owen*, 21 Pick. 559; *Boobier v. Boobier*, 39 Me. 409; *Bryant v. Clifford*, 13 Met. 138.

The rights of the parties in this suit cannot be affected by the claim set up by Mr. Cushing to retain the purchase-money paid to him, on account of his services and disbursements whilst acting as general superintendent. Those matters must be adjusted between the owners. This defendant has nothing to do with them, and he must be held liable for his act of conversion.

The damages, it is agreed, are to be assessed at twenty-three-sixtieths of \$750 and interest.

Defendant defaulted.

**Annexation by the weight of the chattel may be sufficient.**

**SNEDEKER v. WARRING.**

**Court of Appeals, New York, 1854.**

12 N. Y. 170.

PARKER, J. The facts in this case are undisputed, and it is a question of law whether the statue and sun-dial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected at a foreclosure sale under a mortgage, executed by Thom before the erection of the statue and sun-dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection. The claim of the defendant under the mortgage sale is not impaired by the fact that the property in controversy was put on the place after the execution of the mortgage: *Corliss v. Van Sagin*, 29 Me. 115; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306. Permanent erections and other improvements made by the mortgagor on the land mortgaged become a part of the realty, and are covered by the mortgage.

In deciding whether the property in controversy was real or personal, it is not to be considered as if it were a question arising between landlord and tenant, but it is governed by the rules applicable between grantor and grantee. The doubt thrown upon this point by the case of *Taylor v. Townsend*, 8 Mass. 411, is entirely removed by the later authorities, which hold that, as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee: 15 Mass. 159; 4 Metc. 306; 3 Edw. Ch. R. 246; 1 Hilliard on Mortgages, 294, note f, and cases there cited; and see *Bishop v. Bishop*, 11 N. Y. 123, 126.

Governed, then, by the rule prevailing between grantor and grantee, if the statue and dial were fixtures, actual or constructive, they passed to the defendant as part of the realty.

No case has been found in either the English or American Courts deciding in what cases statuary placed in a house or in

grounds shall be deemed real and in what cases personal property. This question must, therefore, be determined upon principle. All will agree that statuary exposed for sale in a workshop, or wherever it may be before it shall be permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected with it as to be considered part of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue, it being placed in a court-yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar, and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture, and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercise a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

By the civil law, columns, figures, and statues, used to spout water at fountains, were regarded as immovable, or real: Pan-

dects, lib. 19, tit. 1, § 17, vol. 7, by Pothier, 107 ; though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as part of the construction, but as ornaments : Corp. Juris Civ., by Kreigel, lib. 19, tit. 1, § 17 ; Poth. Pand., 109 ; Burrill's Law Dic., "Affixus." But Labeo held the rule to be "*ea quæ perpetui usus causa in ædificiis sunt, ædificii esse ; quæ vero ad præsens, non esse ædificii*," thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary, or, as it was generally called by civilians, "its destination." Corp. Jur. Civ., by Kreigel, lib. 19, tit. 1, § 17.

And Pothier says that when, in the construction of a large vestibule or hall niches are made, the statues attached ("attachées") to those niches make part of the house, for they are placed there *ad integrandam domum*. They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be anything in the vestibule without the statues ; and, he says, it is of such statues that we must understand what Papinianus says : "*Sigilla et statuæ affixæ, instrumento domus non continentur, sed domus portio sunt* : Pothier de Communauté, § 56.

By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty : Code Nap., § 525. But statues standing on pedestals in houses, court-yards, and gardens retain their character of "movable" or personal : 3 Touillier, Droit Civil de France, 12. This has reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable : 2 Répertoire Générale, Journal du Palais, by Ledru Rollin, 518, § 139. The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the same work,



page 517, § 129, where the rule is laid down with regard to such ornaments as mirrors, pictures, and statues, that the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base upon which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap (*"vide choquant"*), a foundation and base no longer appropriate or useful: *Ib.*, § 139. Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement, or ornament: 2 *Ledru Rollin, Répertoire Générale*, 514, § 30.

I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its place, under such circumstances, would produce as great an injury and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

There are circumstances in this case, not necessary under the French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sandstone, the same material as the statue, giving to both the statue and base the appearance of being but a single block, and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size, and was not

adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds, when he erected for it a permanent mound and base; and a purchaser had a right so to infer and to be governed by the manifest and unmistakable evidences of intention. It was decided by the Court of Cassation in France, in *Hornelle v. Enregistr.*, 2 *Ledru Rollin*, *Journal du Palais*, *Répertoire*, etc., 214, that the destination which gives to movable objects an immovable character results from facts and circumstances determined by the law itself, and could neither be established or taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law, which deems every person to have intended the natural consequences of his own acts.

There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer-house of wicker-work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would, placed on the house, or as one of two statues placed on the gate-posts at the entrance to the grounds.

An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it perpetual support.

It is said the statues and sphinxes of colossal size which adorn the avenue leading to the Temple of Karnak, at Thebes, are secured on their solid foundations only in their own weight. Yet that has been found sufficient to preserve many of them

undisturbed for 4,000 years: Taylor's Africa, 113, *et seq.*; and if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

I apprehend the question whether the Pyramids of Egypt or Cleopatra's Needle are real or personal property does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing-wax, or a handful of cement. It seems to me puerile to make the title to depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence.

The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it was placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

My conclusion is, that the facts in the case called on the Judge of the circuit to decide, as a matter of law, that the property was real, and to non-suit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be reversed.

## CONSTRUCTIVE ANNEXATION.

**Constructive annexation may be sufficient.**

**FARRAR v. STACKPOLE.**

Supreme Judicial Court of Maine, 1829.

6 Maine, 154.

WESTON, J., delivered the opinion of the Court: If the claim in question passed as a constituent part of the mill, the plaintiffs have made out their title, and have a right to judgment on the verdict. A considerable portion of the machinery and power of a mill, like that conveyed by the defendant, is designed to be applied to draw up logs into the mill, which is essential to the operation of one of this construction. It is not denied that other parts of the machinery intended for this purpose go with the mill; but it is insisted that the chain is of the nature of personal property, and therefore passes not by a deed of the realty, unless specially named. To this it may be answered, first, that if it be an essential part of the mill it is included in that term, whether real or personal; secondly, that that which is in its nature personal may change its character, if fixed, used, and appropriated to that which is real. Is it too much to say that the mill is incomplete without a chain, a cable, or other substitute? It may be that a millwright who contracts to erect a mill, and to furnish materials, may be deemed to have completed his engagement without supplying a chain. One millwright, a witness in this case, has testified that such is his impression. And if this is understood generally his contract might not extend further. But the owner would find that he had yet something more to procure before the mill could be in a condition to operate. The chain is the last of the parts in the machinery to which the impelling power is communicated to effect the object in view. Its actual location in the succession of parts can make no difference. If it is in its nature essential to the mill, it is included in that term; and that, as has been before remarked, whether it be personal or real property. But upon considera-

tion, we are of opinion that it ought to be regarded as appertaining to and constituting a part of the realty.

It is an ancient principle of law that certain things which in their nature are personal property, when attached to the realty, become part of it as fixtures. One criterion is that if that which is ordinarily personal be so fixed to the realty that it cannot be severed therefrom without damage, it becomes part of the realty; as wainscot work and old fixed and dormant tables and benches. Other things pass as incident to the realty, as doves in a dove-house, fish in a pond, or deer in a park: 2 Com. Dig. Biens B. On the other hand, as between landlord and tenant, for the benefit of trade, in modern times many things are regarded as personal which, as between the heir and executor, would descend to the heir as part of the inheritance.

Although the being fastened or fixed to the freehold is the leading principle in many of the cases in regard to fixtures it has not been the only one. Windows, doors, and window-shutters are often hung but not fastened to a building, yet they are properly part of the real estate, and pass with it; because it is not the mere fixing or fastening which is regarded, but the use, nature, and intention: Dane's Abr., ch. 76, art. 8, § 39. Modern times have been fruitful in inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning-rods, which have now become common in this country and in Europe. These might be removed from buildings without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by deed as appertaining to the realty. But the genius and enterprise of the last half-century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes, for the saving of human labor. Hence there has

arisen in our country a multitude of establishments for working in cotton, wool, wood, iron, and marble, some under the denomination of mills, and others of factories, propelled generally by water power, but sometimes by steam. These establishments have in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts; not only the building which shelters, incloses, and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts or to the building; but it would be a very narrow construction which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence, in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms applied to new subjects as they arise. In other words, it will understand terms used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning and acceptance.

There was at Bath, in this State, a saw-mill propelled by steam, generally called the steam saw-mill. Suppose this establishment had been conveyed by the name of the steam saw-mill, without a more particular description. What would pass? There is nothing in the books with respect to this species of property, for it is of quite modern invention; and there is no other mill of the kind in this part of the country. If you exclude such parts of the machinery as may be detached without injury to the other parts or to the building, you leave it mutilated, incomplete, and insufficient to perform its intended operations. The parties in using the general term would intend to embrace whatever was essential to it, according to its nature and design; and the law would doubtless so construe the conveyance as to effectuate the lawful intention of the parties. Salt-pans have been held to pass the realty,

and to belong to the inheritance; because adapted and designed for and incident to an establishment for the manufacture of salt. The principle is that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character, and appertain to the realty, as an incident or accessory to its principal. Upon this ground we are satisfied that the chain in question, being in the mill at the time, and essential to its beneficial enjoyment, passed by the deed of the defendant to Asa Redington, under whom the plaintiffs claim, independent of any reference to usage. The verdict is therefore sustained, although not upon a ground in accordance with the impressions of the Judge who presided at the trial. This we think, upon the whole, a fair application of the principles of law to the case. Had the term mill, however, by uniform and general usage, been understood not to embrace the chain, a different construction would no doubt have obtained; for it is a term of art, the proper meaning of which would be fixed by the general understanding of those who are skilled and experienced in it. If they were not agreed, the law would adopt that which was most general, and which would best accord with the nature and character of the subject-matter. The jury have found, upon the evidence submitted to them, that by general and uniform usage the chain passed by a deed of the mill. This finding was somewhat stronger than the evidence warranted. It did appear that there had been exceptions to this usage, but the weight of evidence went to support it. At any rate, it is apparent that the usage is rather in favor than against the construction we have adopted. But as we are of opinion that the title of the plaintiffs is well supported by the deed, independent of usage, it becomes unnecessary to decide upon the competency or effect of the testimony adduced upon this point.

Judgment on the verdict.

**Saws and millstones, though not actually annexed, may be fixtures.**

BURNSIDE v. TWITCHELL.

Supreme Court of New Hampshire, 1861.

43 N. H. 390.

SARGENT, J. From the case it appears that the Chandlers and Larys, being seized of certain lands in Milan and Success, on the 19th of July, 1854, conveyed the same in mortgage to one A. G. L., which mortgage was duly executed and recorded, and was by the said A. G. L., on the day of its date, assigned and delivered to the plaintiff, with the notes secured by it.

The next year, 1855, the mortgagors built a saw-mill on the premises, and procured the articles here sued for to put into said mill for use there, and they were all, except sixteen of the saws, used in said mill, as such articles are commonly used, for a year or more, and remained there till December 1, 1856; that while thus situated and thus used the plaintiff commenced proceedings to foreclose his mortgage on the premises; that his writ of entry was entered and a conditional judgment was rendered in his favor, and that possession was delivered to him March 25, 1857, of the whole premises, under a writ of possession founded on said judgment.

In the meantime, after the plaintiff had obtained his judgment, and before he got possession, the Chandlers and Larys took the saws and belting from their appropriate places in the mill, and removed them to other places in the mill and the file-room adjoining, which was a part of the establishment, for safe keeping, where they remained till after the time when the plaintiff was put in possession of the whole premises, under his writ, after which the Chandlers and Larys took all the property here in controversy and carried it to Berlin Falls, and April 27, 1857, mortgaged the same to these defendants, as chattels, the mortgage being upon sufficient consideration, and duly executed and recorded.

Before the commencement of this suit the defendants sold the saws and belting upon their chattel mortgage, but have



in no way sold or disposed of or in any way intermeddled with any of the other property, except to take the said mortgage as aforesaid.

Now, upon these facts as stated, no question arises as to any of the property claimed by this plaintiff except the saws and belting. The defendants have taken a chattel mortgage of the other property, but it does not appear that it has ever been in their possession, or that they have ever used or appropriated it in any way, or exercised any acts of ownership over it except to take the mortgage. No demand has ever been made upon them for the property, and it does not appear that they had any knowledge of the situation of the property, or of the plaintiff's claim to it.

If the property had been demanded of the respondents, and they had refused to deliver it, but had claimed to hold it on their mortgage, that would be evidence of a conversion. The Chandlers and Larys may be liable for removing the property from the mill, and their acts in mortgaging it to secure their own debt would constitute a conversion of it by them, as against this plaintiff, provided it should be held that the property was such as passed to the plaintiff by the mortgage of the real estate: *White v. Phelps*, 12 N. H. 386; *Doty v. Hawkins*, 6 N. H. 247.

In addition to purchasing property of one who has no right to sell, there must be the holding possession to the purchaser's use, or the claiming of title or some right to the same, to constitute a conversion: *Lathrop v. Blake*, 23 N. H. 46; *Hyde v. Noble*, 13 N. H. 494; *Lovejoy v. Jones*, 30 N. H. 164.

Leaving out of the case, then, everything but the saws and the belting, let us see how the case stands as to those. The same rule as to fixtures applies between mortgagor and mortgagee as is applied between vendor and vendee and executor and heir, while a different rule applies between landlord and tenant: *Kittredge v. Woods*, 3 N. H. 503; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 232, and cases cited; *Lathrop v. Blake*, 23 N. H. 64; *Wadleigh v. Janvrin*, 41 N. H. 503.

Fixtures and additions in the nature of fixtures, which are placed in a building by a mortgagor after he has mortgaged it, become part of the realty, as between him and the mortgagee, and cannot be removed or otherwise disposed of by him while the mortgage is in force: *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Butler v. Page*, 7 Met. 40; *Pettengill v. Evans*, 5 N. H. 54; *Cole v. Stewart*, 11 Cush. 181; and in the last case it was held not only that the mortgagor could not remove such fixtures, but that any third person who should do so, by permission or request of the mortgagor, was liable for so doing to the mortgagee, though the mortgagor continued all the while in possession.

It is also well settled that where such chattels have been so attached and used as to become parts of the realty, yet when they, by the wrongful acts of the mortgagors, were severed and removed, and became chattels personal again, the property in them still remained in the plaintiff, and he could bring trespass *de bonis asportatis*, or trover for them as for other personal chattels: *Pinkham v. Gale*, 3 N. H. 484; *Sawyer v. Twiss*, 26 N. H. 348; *Plummer v. Plummer*, 30 N. H. 570; *Wadleigh v. Janvrin*, 41 N. H. 520, and cases cited.

So that although the plaintiff might have maintained trespass *quare clausum* against the Chandlers and Larys for entering and taking away this property, if it shall be held to have become parts of this realty, yet he could also maintain trespass *de bonis* against them for carrying away the chattels after they were severed, and converting them, or trover against them or any subsequent holder under them who should convert the same to their own use. The only question then remaining here to settle is, did the saws and belting ever become parts of the belting, as between executor and heir?

As to the sixteen saws never used, they cannot be said to have been so affixed. They were never set in the mill or used there, or in any way attached to it or any part of it. The mere fact that they were purchased with the intention to be used there is not sufficient to make them fixtures. If they had been once affixed, and had been taken out to repair or to file,

while the others were at work in their place, the case would be different, for they would none the less be parts of the mill when thus removed for a temporary purpose than when in actual use.

Articles once affixed and used in such a way as to become parts of the freehold, though disannexed at the time of the sale for a temporary purpose, still pass by the conveyance of the real estate: *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 232; *Lathrop v. Blake*, 23 N. H. 66, and cases cited.

But we think that the saws that had been set and used in the mill for a year or more (and as long as it would seem as the mill was used), while thus in use were as much a part of the mill as the water-wheel or the carriage. They were made fast to portions of the mill by bolts or keys, or in some way, depending somewhat upon whether they were circular or upright saws, which the case does not show.

Machines and other articles essential to the occupation of a building or to the business carried on in it, and which are affixed or fastened to the freehold and used with it, partake of the character of real estate, become part of it, and pass by a conveyance of the land. Nor does so much depend upon the character of the fastening, whether it be slight or otherwise, as does upon the nature of the article and its use, as connected with the use of the freehold: *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 232, 233, and cases cited.

Now, a saw-mill without any saw would be about like a grist-mill without millstones, and millstones have been held to be a part of the realty, even when removed from their place and temporarily severed or disannexed from the other parts of the mill. And it would make no difference, probably, whether the stone thus disannexed was laid up to be picked or was laid in an adjoining room awaiting an occasion when it would be needed in its appropriate place again, as was the case with these saws: *Lyford's Case*, 11 Coke, 50. So in *Regina v. Wheeler*, 6 Mod. 187, it is said a mill is a known thing in law, and so are the parts thereof; and, therefore, if the owner

of a mill take out one of the millstones to pick or gravel it and devise the mill while the stone is severed from it, yet it shall pass as part of the mill.

We see no good reason why the same may not with equal propriety be held true of the saws in a saw-mill. They are actually attached to the other machinery in the mill much more strongly than the stone of the grist-mill. In the latter case, the stone only rests upon the iron-work fixed to the top of the perpendicular shaft which turns it, and is kept there by the force of gravity, while the attachment of the saws must be nice, exact, and strong; the saw must be made secure and fast, so that there may be no lateral motion; and in case of the upright saw, keys must be driven or other means used to produce the necessary tension of the saw. And still, this matter of the attachment, as we have seen, is not the controlling circumstance in the case.

The belting, also, of a mill runs from the large wheel connected with the motive power over a drum upon the main horizontal shaft, upon which are various other drums, upon which are belts connected with the various distinct portions and parts of the machinery. Whether the belting could be removed whole without removing any of the machinery, or whether, as is the case ordinarily, it could not be disengaged from the drums and shafts altogether without removing some of the permanent parts or attachments of the mill, or by disuniting the belts by removing the thongs by which the ends are usually fastened together, the case does not show.

But when a mill of any kind is constructed so as to make belts necessary in order to run the mill, they would seem to be a part, and as essential a part as any other of the mill. Some grist-mills are constructed in this way, with a belt attached to the main shaft and connected with each run of stones, another to the bolt, another to the smut-mill, etc.; others are constructed with a large cog-wheel with other smaller cog-wheels, that can be thrown into it or upon it, to carry each of the other several parts of the machinery. In one case the drums and belts perform the same office that the wheels and gearing

do in the other. The belting is as necessary as the drums, and both are as necessary in one case as the cog-wheels are in the other; one of which might be removed, perhaps, with as little trouble as the other. Why, then, should the cog-wheels be considered as a part of the mill and the belting not be so considered?

In *Wadleigh v. Janvrin*, 41 N. H., before cited, it was held that the tie-up planks, stanchion timbers, hinge staples, and tie chains belonging to a barn passed by a conveyance of the real estate, although they had all been removed, for a temporary purpose from the barn before the sale of the farm, and remained severed at the time of the sale. If these articles became fixtures by having been connected with the building as they had been, and used, as was the case there, we cannot see why, in this case, the belting should not be considered a part of the mill when it was absolutely necessary for the operation of the mill for any useful purpose. That case, we think, covers the whole ground of this case, and so do many of the authorities there cited. So does *Wilson v. The Merchants' Ins. Co.*, 4 Met. 306; *Snedeker v. Warring*, 12 N. Y. 170; *Baker v. Davis*, 19 N. H. 325; *Walker v. Sherman*, 20 Wend. 636; *Farrar v. Stackpole*, 6 Maine, 154, though the last decision seems to be founded upon a special custom or usage in the State of Maine.

We do not intend to hold that a saw might not be put into a mill and used for a temporary purpose, without any design of keeping or using it there permanently, without its becoming a fixture so as to pass with the land, or that the owner of the mill and of the machinery in it, while unincumbered, may not treat the machinery as personal property and sell or mortgage it, or that the same might not be attached as such, when, if he had sold or mortgaged the mill with its appurtenances, without reservation, the whole might have passed in the conveyance, and after third persons had thus acquired rights in it, he could not afterward treat it, nor could it be treated as personal property.

Upon the facts here stated, we think the plaintiff is enti-

tled to recover the value of the twenty-four saws and of the belting.

Judgment for the plaintiff.

*Regina v. Wheeler*, 6 Mod. 187 (1704).

Rolling stock: *Palmer v. Forbes*, 23 Ill. 235; *Pierce v. Emery*, 32 N. H. 484;  
*Titus et al. v. Mabee et al.*, 25 Ill. 232.

Water-wheels: *House v. House*, 10 Paige, 158.

*Contra*: *Hoyle v. Plattsburg, etc., R. R. Co.*, 54 N. Y. 314.

## ANNEXATION UNDER CONTRACT.

## 1. EXPRESS.

**Chattels annexed under express agreement for their removal remain personalty.**

TAFT *v.* STETSON.

Supreme Court of Massachusetts, 1875.

117 Mass. 471.

AMES, J. The steam engine, with the boiler and its appliances, was furnished and set up upon the premises by the defendant, who at the time had no title in the estate. The agreement between him and the owner was that these additions to the premises should continue to belong to him, with the right to remove them whenever he saw fit. They were, therefore, personal property: *Howard v. Fessenden*, 14 Allen, 124; *Morris v. French*, 106 Mass. 326; *Hartwell v. Kelly*, *ante*, 235; and never became the property of the mortgagor, and, of course, did not pass by and were not included in the mortgage. They were rightfully sold by the defendant as his own property, and there is no reason why he should be held accountable to this plaintiff for the proceeds of the sale.

With regard to the rent of the house, it does not appear that any was collected by the defendant, or that any was left uncollected by his fault or neglect. The house was occupied under a claim of right, adversely to the defendant. There having been no release of the homestead, the occupation of the house by the mortgagor and his family was rightful: *Silloway v. Brown*, 12 Allen, 30.

Decree affirmed.

*Hartwell v. Kelly*, 117 Mass. 235; *Dame v. Dame*, 38 N. H. 429; *Ham v. Kendall*, 111 Mass. 297; *Tift v. Horton*, 53 N. Y. 377.

Gas-pipes in streets: *Memphis Gas-Light Co. v. The State*, 6 Cold. (Tenn.) 310.

## 2. IMPLIED.

A building erected on another's land with the owner's permission remains personalty.

OSGOOD *v.* HOWARD.

Supreme Judicial Court of Maine, 1830.

6 Maine, 452.

MELLEN, C. J., delivered the opinion of the Court, in Cumberland, in August following: The question in this case seems to be a new one; or, in other words, the decision of it requires the application of certain well-settled principles to certain facts, where the application of them appears to be considered as a novelty. The facts before us are few and simple, and we wish to be understood as not extending our decision beyond those facts as they have been found by the jury. Cases whose general character might resemble the present, may easily be imagined to involve several interesting and intricate inquiries, the solution of which might be attended with many difficulties. But the finding of the jury has excluded them all from the case under consideration. The buildings whose value is demanded in this action of trover were the absolute property of Henry Howard, the deceased, at the time of his death. The land on which they were erected was then, and continues to be, the property of the defendant. They were erected on the land by his express consent. The buildings have been fairly purchased by the plaintiff, and they are his absolute property; and the defendant has converted them to his own use. Now, the question is, why should not this action be maintained? Almost all the cases which have been cited on both sides are those between lessor and lessee, or heir and executor, and they were decided upon principles of policy, or the mere nature of the property in question, independently of any express contract in relation to this subject—the former according to those usages between landlord and tenant which were established and respected for the benefit of trade, and, in some instances, of husbandry; and the latter accordingly as the subject in question partook most of the realty or personalty—whether attached



or not to the freehold. We apprehend that such cases cannot be of much use in the determination of the case at bar ; for in this the express agreement between the defendant and his son as to the erection of the buildings converted by the defendant places the subject on other grounds, and at once settles the respective rights of the owner of the land and the owner of the buildings. It is not denied that if one erects a building on the land of another wrongfully, the building immediately becomes attached to the freehold, and the property of the owner of the land ; but the case is different in respect to erections which are sanctioned by the relation between landlord and tenant ; and for reasons still stronger, when buildings are erected by one man on the land of another, under his express license and agreement, as was the fact in the instance before us. The case of *Wells v. Banister et al.*, 4 Mass. 514, seems directly in point. There the facts were that a son built a dwelling-house on his father's land, and by his express permission. The Court, then consisting of PARSONS, C. J., and SEWALL and PARKER, Justices, in giving the opinion, say "the property of the house is personal property of the son, he having no estate in the land." We understand that, among the profession, this is the principle recognized and acted upon in practice, that such property is considered personal, and is accordingly always sold on execution in the same manner as all other personal estate is sold at auction. Should we decide this cause in opposition to the above-mentioned principle and practice, we should open a door to innumerable frauds which might be effectually committed with impunity. A person might erect expensive buildings on the land of a friend in whom he could confide, by his express permission ; and thus, in case of failure in business, perhaps a contemplated or intended failure, he would enjoy a home and ample accommodations at the expense of his defrauded creditors ; for if the buildings became the property of the owner of the land, then his creditors could not seize them on execution, and the friend could not be adjudged the trustee of the builder, in consequence of their standing on his land, because the houses are neither goods, effects, or

credits of the builder. We do not perceive any reason why there should not be judgment on the verdict.

Howard v. Fessenden, 14 Allen, 124.

### ADAPTATION.

The use to which a thing is to be put may determine its character as personalty or realty.

JENKINS v. McCURDY.

Supreme Court of Wisconsin, 1879.

48 Wis. 628.

ORTON, J. This action is brought to enjoin the defendant from entering upon the lands of the plaintiffs and removing earth or certain filling material, which had become part of the soil, and for the value of such material which has been thus removed. The defendant, by his answer, admits his entry upon the lands of the plaintiffs and removal of certain material therefrom, which he insists had not become a part of the soil or attached to the freehold, but consisted of fire-wood, piled up and so placed upon the premises as to be personal property, and that he was the owner of the same, and had the right to so enter upon the premises of the plaintiffs and remove it. This case involves the small amount of about nine dollars, and only one question, which is a mixed one of law and fact, and depends entirely upon the facts in proof, and will therefore be but briefly considered.

It appears that the plaintiffs purchased the premises of one Thompson; that at that time the material in question was upon the surface of the soil, either as fire-wood or filling; and that afterward Thompson sold said material to the defendant, and the defendant entered the premises and removed a part of such material therefrom. The character of this material in its nature and uses, its situation upon the land as being actually and physically attached or detached, and the intention of the owner when it was so placed in respect to its use, are questions of fact necessary to be considered in determining the question

of law as to whether this material had become a part of the realty, and passed by deed to the plaintiffs, or whether it was personal and movable property, and was sold to the defendant, and he thereby became the owner. The facts agreed upon, the questions of law are neither difficult nor doubtful. That which is in its nature otherwise personal, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title of the realty: Tyler on Fixtures, 59, 116; Ewell on Fixtures, 31; Conklin v. Parsons, 2 Pinney, 264.

The only question in this case is, Does the evidence show the material to have been "slabs, sawdust, shavings, and other refuse matter" used to fill up low and marshy ground near the mill, as claimed by the plaintiffs, or slabs and pieces of lumber suitable for fire-wood, and piled up on the premises and intended to be used and removed as such? On this question depends the legal conclusion that the material in question is, or is not, personal or real property; and on this question the evidence is conflicting and contradictory. The Circuit Court found that the facts justified the conclusion that the material was personal property and belonged to the defendant, and made a special finding of the facts upon which such conclusion was based. Against these findings there does not appear such a clear preponderance of the evidence as would warrant us in reversing them: Green v. Feil, 41 Wis. 620, and numerous other cases in this Court, and make this the true test for the exercise of this right by this Court.

BY THE COURT.—The judgment of the Circuit Court is affirmed, with costs.

Noble v. Sylvester, 42 Vt. 146.

## DISANNEXATION.

## 1. BY ACT OF PARTY.

**Parts of the realty, as fences, if temporarily detached without the owner's intention to divert them from their use, remain realty.**

GOODRICH *v.* JONES.

Supreme Court of New York, 1841.

2 Hill, 142.

COWEN, J. The Common Pleas appear to have taken the same view of Goodrich's, or rather Vose's title to the boards as did the Justice. There cannot be a doubt that they were right. Fences are a part of the freehold ; and that the materials of which they were composed are accidentally or temporarily detached, without any intent in the owner to divert them from their use as a part of the fence, works no change in their nature : *Vid.* Walker *v.* Sherman, 20 Wendell, 639, 640.

With regard to the manure, we have held that even as between landlord and tenant, it belongs to the former ; in other words, it belongs to the farm whereon it is made. This is in respect to the benefit of the farm, and the common course of husbandry. The manure makes a part of the freehold : Middlebrook *v.* Corwin, 15 Wendell, 169. Nay, though it be laid up in heaps in the farm-yard : Lassell *v.* Reed, 6 Greenl. 222 ; Daniels *v.* Pond, 21 Pick. 367 (*a*). The rule has always been still stronger in favor of the vendee as against vendor, and heir as against executor. In Kittredge *v.* Woods, 3 N. H. 503, it was accordingly decided that manure lying in a barn-yard passes to the vendee. See, also, Daniels *v.* Pond, before cited.

The case of Kittredge *v.* Woods was very well considered ; and the right of the vendee to the manure, whether in heaps or scattered in the barn-yard, vindicated on principle and authority I think quite satisfactorily.

There are several English dicta which conflict with our views of the right to manure, as between landlord and tenant, and that of the Court in New Hampshire, as between vendor and vendee: And *vid.* 2 Kent's Com. 346, note c, 4th ed., and *Carver v. Pierce*, Sty. 66. But they may all be considered as repudiated by *Middlebrook v. Corwin*. *Vide* the introductory remarks of Mr. Justice NELSON, 15 Wend. 170.

The judgment of the Common Pleas must be reversed, and that of the Justice affirmed.

Judgment reversed.

*McLaughlin v. Johnson*, 46 Ill. 163; *Rogers v. Gilinger*, 30 Pa. St. 185; *Harris v. Scovel*, 48 N. W. Rep. 172; *Huebschmann v. McHenery*, 29 Wis. 655; *Ogden v. Stock*, 34 Ill. 522.

## 2. BY ACT OF LAW.

The sale of a building which is part of the realty changes it to personalty as between the buyer and seller.

DAVIS *v.* EMERY.

Supreme Judicial Court of Maine, 1870.

61 Me. 140.

APPLETON, C. J. This is an action of trover to recover the value of a building to which the plaintiff claims title by a bill of sale in the following words:

"NEWFIELD, Nov. 6, 1865.

"\$40.00.

"J. B. Davis bought of Elizabeth Emery one building 23 feet wide and 50 feet long, now standing west of my house and barn. Said building is to be moved off from where it now stands by the first of May next. Price, forty dollars. Received pay.

ELIZABETH EMERY."

The building was not removed within the time specified. Upon the foregoing writing the Justice presiding instructed the jury that if they found that the term limited in said writing was not extended prior to the first of May, A. D. 1866, by the

defendant, that the title of the building would revest in the defendant, and that the plaintiff would not have a right to go on and remove the same.

The plaintiff bought the barn and paid for it. As between the parties to this suit it must be deemed personal property. The defendant having sold it as such and received the price agreed upon cannot claim it as a part of the realty. It stands precisely as if it had been a sale of a cart or a wagon, which was to be stored by the seller for a specific time, and which was not removed by the buyer within that time. The title to the article sold and paid for would not be changed by the neglect of the purchaser to remove it at a stipulated day.

The phrase "said building is to be moved off from where it now stands by the first of May next" being included in the bill of sale to the purchaser, he must be regarded as having assented thereto and thereby impliedly to have agreed to remove it in accordance with this provision, and is liable in damages for its non-removal within the time specified: *Newell v. Hill*, 2 Met. 180; *Pike v. Brown*, 7 Cush. 133; *Maine v. Cumston*, 98 Mass. 317. There is nothing in the language indicating that the building would be forfeited and the title revest in the seller if a removal was not made by the first day of May then next.

If it is to be regarded as a license within which time the purchaser might remove the building, still the neglect to remove would not constitute a forfeiture. The purchaser might be liable in trespass for all damage done by him to the owner of the land in removing the building, but not for the value of the property removed: *Dame v. Dame*, 38 N. H. 429. The title to the property sold was in the purchaser: *Nelson v. Nelson*, 6 Gray, 385; *Nettleton v. Sikes*, 8 Met. 34.

The law relating to fixtures, whether as between grantor and grantee, mortgagor or mortgagee, or landlord and tenant, has no bearing upon the question under consideration. As between the buyer and seller the building was a personal chattel, which the purchaser was to remove in a given time, and until that time it was to remain on the seller's land. It

was the simple case of a merchant storing goods for a limited time for the purchaser, who had paid the price therefor.

The cases cited by the counsel for the defendant are inapplicable. In *Pease v. Gibson*, 6 Greenl. 81, the sale was not of a specific article but only of so much timber as the vendee might take off within the time limited in his contract. To the same effect are the cases of *Reed v. Merrifield*, 10 Met. 155, and *Howard v. Lincoln*, 13 Me. 122.

In *Vincent v. Cornell*, 13 Pick. 294, oxen were sold, the title to be perfect upon payment within a stipulated time, and the price not being paid, the title was held to remain in the vendor. So, the case of *Fairbanks v. Phelps*, 22 Pick. 535, was one of a conditional sale, the title to become perfect in the vendee when the purchase-money was paid. But in this case there was no sale on condition and there was nothing due the seller, the price having been paid at the time of the purchase.

Exceptions sustained.

As to trees—*Sterling v. Baldwin*, 42 Vt. 306.

## TRADE FIXTURES.

Fixtures erected by a tenant upon demised premises for purposes of trade remain personalty during the term.

LEMAR v. MILES.

Supreme Court of Pennsylvania, 1835.

4 Watts, 330.

SERGEANT, J. The general principle is that a fixture erected by a tenant on demised premises, for the purpose of carrying on his trade, is personal property, and may be removed or levied on by *fieri facias* against him, and at his death, if not disposed of, passes to his executor. In *Lawton v. Lawton*, 3 Atk. 13, a fire-engine set up for the benefit of a colliery by a tenant for life was considered part of his personal estate, passing to the executor as assets, and not to the remainderman as annexed to the freehold, it being for the benefit of the public to encourage tenants to do what is advantageous to

the estate during their term. The same point was afterward decided in *Dudley v. Warde*, Amb. 113, where an engine of a similar kind was considered part of the personal estate, whether erected by tenant for life or in tail. In *Van Ness v. Packard*, 2 Peter's S. C. Rep. 137, the subject is carefully examined by Justice STORY, and the tenant was there held not to be liable for pulling down and removing a wooden dwelling-house, with a cellar of stone or brick foundation, and a brick chimney, which he had erected on a demised lot of ground for a term of years reserving rent, with a view of carrying on the business of a dairyman, and for the residence of his family and servants engaged in the business. The present is the case of a steam engine set up by the tenant on the demised premises and used in lieu of horse-power, for more advantageously carrying on the manufacture of salt. It must, therefore, be deemed personal property belonging to him, and as such liable to be seized and sold on the execution of his judgment creditor. In *Gray v. Holdship*, 17 Serg. & Rawle, 413, the copper kettle in the brew-house was erected by the owner of the inheritance, and would have passed to the purchaser of the building unless specially reserved; it was, therefore, part of the building within the mechanics' lien law. The case of *Morgan v. Arthurs*, 3 Watts, 140, was determined on the same grounds. But here the engine was purchased and erected by the tenant, and was never part of the inheritance.

It is supposed, however, that the terms of this lease form an exception to the general rule. There is a covenant on the part of the lessees to bore the wells to the depth of five hundred feet if practicable, and as much deeper as they please, and to make all additional and necessary erections at their own expense. It is afterward declared that should the wells fail at any time during the lease the lessees were at liberty to give them up by paying up the rent to the time of said failure; and should such failure take place within the term of three years the lessees were at liberty to take away all the metal and improvements of the works, or be paid the value thereof, at the choice of the lessor. This covenant seems to contain an im-



plication that if the lessees gave up the works after the three years, on account of failure of the water, the erections were to belong to the lessor. The reason of this covenant is not very clear; but, perhaps, it was thought right they should remain as an indemnity to the lessor for his loss, where the lessees had enjoyed the strength of the wells during, perhaps, a larger part of the term. But there was no surrender on account of failure; for although one witness for the plaintiffs said he thought the water failed the first year, he explained by saying it got weaker; it was not more than half as good, perhaps. He also states that the well was not given up to Lemar. The event contemplated, then, never occurred; and the rights of the parties can only be adjusted by the application of the usual legal principles. Besides, I am inclined to think this clause refers to erections of a more real and permanent character than an engine. The words "metal and improvements" may comprehend all permanent fixtures of iron or other metal, and all buildings, whether dwelling-houses, stables, sheds, walls, or of whatever kind, set up for the purpose of carrying on the business more conveniently; the right to remove which might have been considered as questionable, unless expressly agreed to. But for an article in itself decidedly personal, it was not necessary to make such provision, and it ought not by implication to be applied to it.

Judgment affirmed.

Poole's Case, 1 Salk. 368; Reynolds v. Shuler, 5 Cowen, 323; Moore v. Smith, 24 Ill. 512; s. c., 26 Ill. 392; Merit v. Judd, 14 Cal. 59; Davis v. Moss, 38 Pa. St. 346; Lacey v. Giboney, 36 Mo. 320; Holbrook v. Chamberlain, 116 Mass. 155; Seeger v. Pettit, 77 Pa. St. 437; Dingley v. Buffum, 57 Me. 381; Allen v. Kennedy, 40 Ind. 142; Kile v. Giebner, 7 Atl. 154.

NOTE.—As to electric poles, wires, and lamps, see 12 S. W. Rep. 489.

The annexation may be such as to change their character to realty.

O'BRIEN *v.* KUSTERER.

Supreme Court of Michigan, 1873.

27 Mich. 289.

GRAVES, J. On the 13th of August, 1868, the complainants in the original bill, O'Brien and Calkins, leased to the defendant Kusterer and one Werner, for three years from the 15th of the succeeding September, the east basement of Phoenix Hall, in Grand Rapids, for an eating-house or saloon, at a yearly rent of \$600, payable quarterly. The lessors, at considerable expense, fitted up the property with a bar and other conveniences, to adapt it to the business to be carried on by the lessees. Some time in the fall the lessees entered under the lease. In some little time afterward one Schoeding became associated with Werner, and the room was extensively altered and fitted up by the tenants with bowling-alleys, which were put down and connected with the floor and sleepers in a very substantial manner. The changes were numerous and thorough, and the character of the establishment was completely altered. In the course of a few months the defendant Kusterer united in himself the whole leasehold interest, by purchase or otherwise, and on the 24th of May, 1870, assigned to the defendant Conkey, and took back a chattel mortgage to secure \$350 of the purchase price. In this transaction Kusterer assumed to sell and take back a mortgage upon the alleys and other fittings, and they were described in the mortgage as "all and singular the bar, bar fixtures, ice-box, four bowling-alleys, with the balls and pins appertaining thereto, with all the chairs and tables therein, one chandelier over the bar, two street lamps and signs, with all keys, faucets, stock on hand, and all fixtures and furniture—all in the Court Place Saloon, so called—in the basement of the Phoenix Block, so called, on the north side of Lyon Street, in said City of Grand Rapids, being the same property this day sold by said Kusterer to said Conkey, and this mortgage being given for a part of the purchase price thereof."

About June 1, 1870, Conkey sold the same property to James

Irons, the complainant in the cross-bill, for the consideration of \$1,050, and Irons assumed, as part of the consideration, the payment of the chattel mortgage given by Conkey to Kusterer. At this time Kusterer assured Irons that the property was "all right," and that he would "stand between him (Irons) and all harm." A controversy had previously arisen between the complainants in the original bill, O'Brien and Calkins, and Kusterer, as to the ownership of the alleys and some other things in the establishment.

O'Brien and Calkins claimed that the bar, bar fixtures, cupboard, bowling-alley ways and racks, were permanent fixtures, and belonged to them as owners of the reversion, and the defendant Kusterer insisted that they were removable articles, and subject to and held by his mortgage from Conkey. The mortgage becoming due, and Irons declining to pay it while the title to the property was thus in dispute, Kusterer threatened to enforce his mortgage lien, and remove the property from the premises. O'Brien and Calkins thereupon filed the original bill to prevent any interference with, or removal of, the property claimed by Kusterer, and to restrain the alleged injury and waste which a removal would be likely to produce. Irons then filed the cross-bill to protect his interests as they should be affected by results.

The Circuit Court, in passing upon the case of the original bill, decreed that the bar, bar fixtures, cupboard, bowling-alley ways and racks were fixtures attached to the building, and owned by complainants, and awarded a perpetual injunction; and in passing upon the cross-cause adjudged that the defendant Kusterer should pay to Irons \$900, with interest thereon from June 24, 1870, in the place of the fixtures.

But two questions were made on the hearing in this Court, the first being whether the things in question were so annexed to the freehold as to belong to it. This question is decisively answered in the affirmative by the evidence, and it would be a waste of time to repeat it.

The second question is whether Calkins' conduct was such as to estop himself and O'Brien from claiming, against the

mortgage rights of Kusterer, that the property was permanently and immovably attached, and I think upon a fair estimate of the evidence this question should be answered in the negative.

Kusterer was a tenant holding of Calkins and O'Brien when the annexations were made, and they are to be considered as made by his direction and authority, or, at all events, with his sanction ; and by itself, his sale of the things so annexed, as personalty, and the taking a chattel mortgage back upon them, could not invest him with any new right as against his landlord. Such a transaction, standing alone, could not affect the right of the landlord derived from the annexation. It might tend more or less to show that the tenant did not consider the fixtures immovable. But the landlord would not be concluded, unless shown in some satisfactory way to have assented to their being dealt with by the tenant as personalty, or things removable.

The fixtures now in question were made a part of the realty, so far as mechanical annexation could make them so, before Kusterer sold to Conkey, and got the mortgage back ; and the evidence does not show that when that annexation occurred, it was one which left the tenant at liberty to sever and remove what was annexed. When this transaction with Conkey occurred, Kusterer had no title, as against O'Brien and Calkins, to these things as personalty, and he gained none by the mortgage from Conkey, unless O'Brien and Calkins in some way waived or relinquished their right derived from the annexation, or precluded themselves from asserting it against him, and this I think the evidence, when fairly considered, shows they did not do.

The decree below should be affirmed, with costs.

*Talbot v. Whipple*, 14 Allen, 177.

## AGRICULTURAL FIXTURES.

**Agricultural fixtures are recognized in this country.**

VAN NESS *v.* PACARD.

Supreme Court of the United States, 1829.

2 Peters, 137.

Mr. Justice STORY delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the District of Columbia, sitting for the County of Washington.

The original was an action on the case brought by the plaintiffs in error against the defendant for waste committed by him, while tenant of the plaintiffs, to their reversionary interest, by pulling down and removing from the demised premises a messuage or dwelling-house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant, upon which a judgment passed in his favor; and the object of the present writ of error is to revise that judgment.

By the bill of exceptions filed at the trial it appeared that the plaintiffs in 1820 demised to the defendant, for seven years, a *vacant* lot in the City of Washington, at the yearly rent of \$112.50, with a clause in the lease that the defendant should have a right to purchase the same at any time during the term for \$1,875. After the defendant had taken possession of the lot he erected thereon a wooden dwelling-house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down and removed all the materials from the lot. The defendant was a carpenter by trade; and he gave evidence, that upon obtaining the lease he erected the building above mentioned *with a view to carry on the business of a dairyman*, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils

of his said business were kept and scalded, and washed, and used ; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter, and two apprentices in the house, and a work-bench out-of-doors ; and carpenter's work was done in the house, which was in a rough, unfinished state and made partly of old materials. That he also erected on the lot a stable for his cows of plank and timber fixed upon posts fastened into the ground, which stable he removed with the house before the expiration of his lease.

Upon this evidence the counsel for the plaintiffs prayed for an instruction, that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises ; and that he was liable to the plaintiffs in this action. This instruction the Court refused to give ; and the refusal constitutes his first exception.

The defendant farther offered evidence to prove that a usage and custom existed in the City of Washington, which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs objected to this evidence ; but the Court admitted it. This constitutes the second exception.

Testimony was then introduced on this point, and after the examinations of the witnesses for the defendant, the plaintiffs prayed the Court to instruct the jury that the evidence was not competent to establish the fact that a general usage had existed or did exist in the City of Washington which authorized a tenant to remove such a house as that erected by the tenant in this case ; nor was it competent for the jury to infer from the said evidence that such a usage had existed. The Court refused to give this instruction, and this constitutes the third exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage ; and after their testimony was given, he prayed the Court to instruct the jury, that upon the evidence given as aforesaid in this case, it is not competent for them to find a usage or custom of the place by which the defendant

could be justified in removing the house in question; and there being no such usage, the plaintiffs are entitled to a verdict for the value of the house which the defendant pulled down and destroyed. The Court was divided and did not give the instruction so prayed; and this constitutes the fourth exception.

The first exception raises the important question, what fixtures erected by a tenant during his term are removable by him?

The general rule of the common law certainly is that whatever is once annexed to the freehold becomes part of it, and cannot afterward be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible and without exceptions. It was construed most strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord ELLENBOROUGH in delivering the opinion of the Court in *Elwes v. Maw*, 3 East's R. 38; and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine and its admitted exceptions in England. The Court there decided, that in the case of landlord and tenant there had been no relaxation of the general rule in cases of erections *solely for agricultural purposes*, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant they became a part of the realty and could never afterward be severed by the tenant. The distinction is certainly a nice

one between fixtures for the purposes of trade and fixtures for agricultural purposes ; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us ; and it is now unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark that learned Judges at different periods in that country have entertained different opinions upon it, down to the very date of the decision in *Elwes v. Maw*, 3 East's R. 38.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright ; but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold so far as it respects heirs and executors was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result ; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value if he was to lose his whole interest therein by the very act of erection ? His cabin or log-hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine



were not previously adopted in a State by some authoritative practice or adjudication, it ought to be assumed by this Court as a part of the jurisprudence of such State upon the mere footing of its existence in the common law. At present it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated that the exception of buildings and other fixtures for the purpose of carrying on a trade or manufacture is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII, 13, *a.* and *b.*, where it was laid down, that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels *to occupy his occupation*, during the term, he may afterward remove them. That doctrine was recognized by Lord HOLT in Poole's Case, 1 Salk. 368, in favor of a soap-boiler who was tenant for years. He held that the party might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any custom) *in favor of trade and to encourage industry*. In Lawton v. Lawton, 3 Atk. R. 13, the same doctrine was held in the case of a fire-engine set up to work in a colliery by a tenant for life. Lord HARDWICKE there said that since the time of Henry VII the general ground the Courts have gone upon of relaxing the strict construction of law is that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during the term. He added, "one reason which weighs with me is its being a *mixed case*, between enjoying the profits of the land, and carrying on a species of trade; and in considering it in this light it comes very near the instances in brew-houses, etc., of furnaces and coppers." The case, too, of a cider-mill, between the executor and heir, etc., is extremely strong, for though cider is a part of the profits of the real estate, yet it was held by Lord Chief Baron COMYNS, a very able common lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor. "It does not differ it, in

my opinion, *whether the shed be made of brick or wood*, for it is only intended to cover it from the weather and other inconveniences." In *Penton v. Robart*, 2 East, 88, it was further decided that a tenant might remove his fixtures for trade even after the expiration of his term if he yet remained in possession; and Lord KENYON recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the Court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boiler of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton*, 3 Atk. R. 13, Lord HARDWICKE said (as we have already seen) that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart*, 2 East's R. 88, the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the Court thought the building removable. In *Elwes v. Maw*, 3 East's R. 37, Lord ELLENBOROUGH expressly stated that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose it falls within the exception in favor of trade. The case of the Dutch barns before Lord KENYON<sup>1</sup> is to the same effect.

Then as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immov-

<sup>1</sup> *Dean v. Allalley*, 3 Esp. Rep. 11; *Woodfall's Landlord and Tenant*, 219.

able. But if the residence of the family was merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was, "that the defendant erected the building before mentioned, *with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business.*" The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely, it cannot be doubted, that in a business of this nature the immediate presence of the family and servants was, or might be, of very great utility and importance. The defendant was also a carpenter, and carried on his business as such in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and unless we are prepared to say (which we are not) that the mere fact that the house was used for a dwelling-house as well as for a trade superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron COMYNS, and Lord HARDWICKE, and therefore entitled to the benefit of the exception. The case of *Holmes v. Tremper*, 20 Johns. R. 29, proceeds upon principles equally liberal, and it is quite certain that the Supreme Court of New York were not prepared at that time to adopt the doctrine of *Elwes v. Maw* in respect to erections for agricultural purposes. In our opinion the Circuit Court was right in refusing the first instruction.

The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the City of

Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conversant of the custom, and to contract with a tacit reference to it. Cases of this sort are familiar in the books; as, for instance, to prove the right of a tenant to an away-going crop.<sup>1</sup> In the very class of cases now before the Court the custom of the country has been admitted to decide the right of the tenant to remove fixtures.<sup>2</sup> The case before Lord Chief Justice TREBY turned upon that point.<sup>3</sup>

The third exception turns upon the consideration whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was, if by competent is meant that it was admissible to go to the jury. Whether it was such as ought to have satisfied their minds on the matter of fact was solely for their consideration; open, indeed, to such commentary and observation as the Court might think proper in its discretion to lay before them for their aid and guidance. We cannot say that they were not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose and indeterminate, and so be urged with more or less effect upon their judgment; but in a legal sense it was within their own province to weigh it as proof or as usage.

The last exception professes to call upon the Court to institute a comparison between the testimony introduced by the plaintiff and that introduced by the defendant against and for the usage. It requires from the Court a decision upon its relative weight and credibility, which the Court were not justified in giving to the jury in the shape of a positive instruction.

<sup>1</sup> 2 Starkie on Evidence, Part IV, p. 453.

<sup>2</sup> Woodfall's Landlord and Tenant, 218.

<sup>3</sup> Buller's Nisi Prius, 34.

Upon the whole, in our judgment, there is no error in the judgment of the Circuit Court, and it is affirmed, with costs.

*Elwes v. Maw*, 3 East, 38; *Whitney v. Brasto*, 4 Pick. 310; *Homes v. Tremper*, 20 Johns. 29. But see 13 Pa. St. 438; *Buckman v. Outwater*, 28 N. J. Law, 518.

To the same point.

MIDDLEBROOK *v.* CORWIN.

Supreme Court of New York, 1836.

15 Wend. 169.

NELSON, J. It is laid down in several books that manure in heaps, before it is spread upon the land, is a personal chattel: 11 Viner, 175, tit. Executors; Toller's Law of Executors, 150; Matthew's Executors, 27. It further appears that it is common to insert a covenant in the lease of a farm, to leave the manure of the last year upon it. All this would seem to imply that the article belongs to the tenant, and that without a covenant he might remove it. If a farm is leased for *agricultural* purposes, good husbandry, which without any stipulation therefor is implied by law, would undoubtedly require it to be left; if rented for other purposes, this conclusion might not follow. In *Watson v. Welsh*, tried in 1785, in summing up to the jury, the Judge said that it was matter of law to determine what was using the land in a husbandlike manner, and expressed the opinion that under a covenant so to work a farm the tenant ought to use on the land all the manure made there, except that when his time was out he might carry away such corn and straw as he had not used there, and was not obliged to bring back the manure arising therefrom: Woodfall's Landlord and Tenant, 255; 1 Esp. N. P., part 2, p. 131. Perhaps this rule should be taken with some qualifications. The practice and usage of the neighboring country, and even in relation to a particular farm, should enter into the decision of the question: 4 East, 154; Doug. R. 201; Holt's N. P. R. 197; 2 Barn. & Ald. 746. This is reasonable,

because the parties are presumed to enter into the engagement with reference to it, where there is no express stipulation. What may be good husbandry in respect to one particular soil, climate, etc., may not be so in respect to another. Independently, however, of the usage and custom of the place, the rule of Mr. Justice BULLER, I apprehend, may be the correct one. In the recent case of *Brown v. Crump*, 1 Marsh, 567, Chief Justice GIBBS said that he had often heard him (Mr. Justice BULLER) lay down the doctrine "that every tenant, where no particular agreement existed dispensing with that engagement, is bound to cultivate his farm in a husbandlike manner, and to consume the produce on it. This is an engagement that arises out of the letting, and which the tenant cannot dispense with, unless by special agreement." Without carrying the doctrine to this extent, we may, I think, safely say, upon authority, that where a farm is let for agricultural purposes, no stipulation or custom in the case, the manure does not belong to the tenant, but to the farm; and the tenant has no more right to dispose of it to others, or remove it himself from the premises, than he has to dispose of or remove a fixture.

Case is the appropriate action for the injury complained of: 1 Chitty's Pl. 142. The tenant having no authority himself to remove the manure, could give none to the defendant. The judgment of the Common Pleas must be reversed, and that of the Justice affirmed.

Judgment accordingly.

*Sawyer v. Twiss*, 26 N. H. 345; *Wetherbee v. Ellison*, 19 Vt. 379; *Buckman v. Outwater*, 28 N. J. Law, 581. See, also, *Cory v. Bishop*, 48 N. H. 146; *Dame v. Dame*, 34 N. H. 429; *Gallagher v. Shipley*, 24 Md. 418.

## DOMESTIC FIXTURES.

**Domestic fixtures, as stoves, pictures, etc., remain personalty during the term as between landlord and tenant.**

GAFFIELD *v.* HAPGOOD.

Supreme Judicial Court of Massachusetts, 1835.

17 Pick. 192.

PUTNAM, J. The fire-frame was without doubt personal property before it was fixed to the freehold. But afterward it became a part of the house, and would have passed by a deed of the house as a door or window of the house would have passed, provided there were no exception in the deed to the contrary. But although it is to be considered as a fixture, yet the lessee during *the continuance* of his lease might have removed it: *Lawton v. Lawton*, 3 Atk. 16, *in notis*. But he must remove it during the term. He cannot lawfully do it afterward. In *Lee v. Risdon*, 7 Taunt. 188, GIBBS, C. J., says, unless the lessee uses the privilege of severing fixtures during the term he cannot afterward do it; adding, "and it never was heard of that trover could be afterward brought."

While it remained fixed to the freehold, it is clear that if one had unfixed and taken it away at one time, it would not have been a felony, but a trespass. The case of *Penton v. Robart*, 2 East, 88, might seem to recognize the right of the tenant to remove a fixture after the expiration of the term. That was a trespass for breaking a close and removing a building. It was brought by a landlord against the tenant. The defendant made no defense to breaking and entering the close, and the plaintiff recovered a shilling for that, but the defendant pleaded a justification for removing the building as set forth in the declaration, that it was a building erected by him on the premises for the purpose of carrying on his trade, and *that he still continued in possession of the premises* at the time when, etc. The justification was held sufficient. The relation of landlord and tenant must have been considered as having continued, and *as still existing* in respect to the demised premises, notwithstanding the first term had expired. The

defendant, as it seems to me, might and ought to have pleaded the general issue as to breaking and entering the close and a justification as to the rest.

If the fixture should not be removed during the term, and the tenant should quit, and the landlord take possession afterward, the law is very clear that the fixture becomes a part of the freehold, and that the party who was tenant cannot legally take it away afterward.

And there are no facts stated in the present case which will vary this well-established rule of law.

The circumstance that the owners of the estate offered it for sale with a reservation of the fire-frame for the tenant, who was then in possession, is of no avail; because the sale was not made. The tenant sold the fire-frame to the plaintiff on the day before he left the premises. The vendee could not be in a better situation than the tenant was. He might, as has been said, have severed the frame from the chimney while his tenancy continued, but he left the premises, with the frame attached and fixed by brick and mortar to the house. It is very certain that thereupon it became the property of the owners of the freehold.

There are various annexations to the freehold estate, which, if the tenant make them at his own expense, cannot be removed by him during the term. As if he puts glass into the windows: Co. Litt. 53 *a*; and the reason given is, that the glass is become part of the house. It shall go to the heir and not to the executor, for as is said in *Herlakenden's Case*, 4 Co. R. 62, if they (the windows) be open to the tempests and rain, waste and putrefaction of the timber would follow. So I apprehend it would be, if the tenant should shingle the house, or put another story upon it. Such necessary or even expensive reparation or addition would, at this day, be considered as given to the owner of the freehold.

But the law has accommodated itself to the existing advanced state of society; and the tenant may, during the term, take away chimney-pieces; and even a wainscot, if put up by himself: Co. Litt. *ubi sup.* (Hargr. note 5); which, as the law



stood before and at the time of Lord COKE, he could not have been permitted to do.

The reason of the relaxation of the rule is found in the public policy and convenience, which permit the tenant to make the most profitable and comfortable use of the premises demised that can be obtained consistently with the rights of the owner of the freehold. The inheritance is not to be prejudiced.

The law upon this subject was very much discussed in *Elwes v. Maw*, 3 East, 38, by the Court and bar; and such annexations made with regard to trade were recognized; but such as were made in regard to agricultural improvements were still left to the operation of the old law; with what correctness of inference, it is not necessary in the case now under consideration to decide. For this case is clear of all difficulty, and is decided in favor of the defendant for the reasons before suggested.

Plaintiff non-suit.

*Wall v. Hinds*, 4 Gray, 271; *Bircher v. Parker*, 40 Mo. 120; *Seeger v. Pettit*, 77 Pa. St. 440; *Hayes v. Doame*, 11 N. J. Eq. 14.

#### TIME OF REMOVAL.

Fixtures must be removed during the term in the absence of any agreement to the contrary.

DAVIS v. BUFFUM.

Supreme Judicial Court of Maine, 1863.

51 Me. 160.

APPLETON, C. J. On the 7th of January, 1854, the defendant leased his saw-mill to Samuel Mitchell and A. C. Grant, who put the machinery which is the subject-matter of the present suit in the same. After remaining sometime in possession of the premises leased, they assigned the lease and sold the machinery to the plaintiffs, who thereupon entered and occupied. During their occupation, and before the expiration of the term, the defendant, by deed of warranty, dated December

15, 1854, conveyed his mill, "being known as the Buffum mill, . . . with the privileges and appurtenances thereto belonging," to Joseph Dane, Jr., and Oliver Perkins, Jr., to whom the plaintiffs attorned, paying to them rent during the residue of the term, which expired the last of July, 1855, when they quit the premises, leaving their machinery therein. On or about the 1st of September following, they made a demand upon the defendant for the articles in controversy.

It appears in evidence that the defendant, before executing his deed, claimed the machinery to be so affixed to the mill as to have become a part of the realty and not removable—and that his grantees, after its execution, claimed that they were owners of the same, but neither they nor the defendant ever interfered with the plaintiffs' possession or use of the same during the continuance of the lease, nor then, nor at any other time, prevented their removing the same.

When chattels are so far annexed to the freehold as to become fixtures, they pass, in all cases, to a grantee of the land, unless expressly excepted in the conveyance: *Preston v. Briggs*, 16 Vt. 124, and become the property of a mortgagee as against a mortgagor: *Butler v. Page*, 7 Met. 40; *Corliss v. McLagin*, 29 Me. 115. So the judgment creditor acquires them by a levy on the real estate of his debtor: *Trull v. Fuller*, 28 Me. 544. But, in the case at bar, Dane and Perkins were aware of the plaintiffs' lease and their rights under the same, and could, therefore, acquire no rights as against them, though, perhaps, they might have had a claim against their grantor on the covenants of his deed: *Powers v. Dennison*, 30 Vt. 752.

As between landlord and tenant, the latter may, during the continuance of his lease, remove fixtures erected by him for purposes of trade, manufacture, or ornament, when the removal can be effected without permanent injury to the freehold. But this removal must be made during the continuance of the lease. In *Leader v. Honewood*, 94 E. C. L. 544, it was held that an outgoing tenant has no right to enter for the purpose of severing and removing fixtures after the expiration of his term, and a new tenant has been let in possession. The general

rule is "that fixtures go, at the expiration of the term, to the landlord, unless the tenant has during the term exercised the right to remove:" *Heap v. Barton*, 12 C. B. 274, 74 E. C. L. "All fixtures," observes REDFIELD, J., in *Preston v. Briggs*, 16 Vt. 124, "for the time being are part of the freehold, and, if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and, if this is not done, the right to remove is lost, and trover cannot be maintained for a refusal to give them up." And such seems to be the law as determined in *Stockwell v. Marks*, 17 Me. 455; in Massachusetts, in *Gaffield v. Hapgood*, 17 Pick. 192; in *Shephard v. Spaulding*, 4 Met. 416; in New Hampshire, in *State v. Elliott*, 11 N. H. 540, and *Conner v. Coffin*, 2 Foster, 541; and in Connecticut, in *Burr v. St. John*, 16 Conn. 522. It was, however, held by JARVIS, C. J., in *Heap v. Barton*, 12 C. B. 274, 74 E. C. L., "that the tenant may remove the fixtures, notwithstanding the term has expired, if he remains in possession of the premises." But the plaintiffs' right of removal, whatever it was, remained unimpaired and unaffected by the defendants' deed to Dane and Perkins, and they might at any and all times have exercised it during the lease, had they so chosen.

This being an action of trover, the only question presented is whether the plaintiffs have shown an act of conversion on the part of the defendant.

The plaintiffs claim to recover on the ground that the defendant's deed to Dane and Perkins was *per se* a conversion—before the expiration of his lease.

But this is not so. When that deed was executed the plaintiffs were in the undisturbed enjoyment of their property, and so remained during the whole duration of the lease. The deed of the defendant conveyed nothing he did not own; certainly not to grantees with notice of all the facts. The giving a bill of personal property in the possession of a third person, who is the owner of the same, without any other interference therewith or delivery thereof, is not, as against such owner, a conversion by either the person giving or receiving such bill of

sale. In *Fuller v. Taber*, 39 Me. 519, the plaintiff brought an action of trover for a building which had been placed on the land of another by his precedent consent, or subsequent assent. The defendant, when a demand was made, said he had bought it and paid for it. The Court instructed the jury that taking a quit-claim deed of the land and building and putting it on record would not of *itself* constitute a conversion on the part of the individual so receiving the deed. Neither can the mere giving a deed of land leased, the lessee continuing in quiet possession, be deemed a conversion of fixtures which the tenant has a right to remove during his term. The lease was as valid after as before the deed. The rights of the lessee remained the same. The deed was no more a conversion of the tenant's fixtures than it was a breach of the covenants of the lease. The mere taking a mortgage of personal property from one having no title and recording the same, without taking possession of the mortgaged property or interfering with the same, constitutes no conversion for which trover will lie: *Burnside v. Twitchell*, 43 N. H. 390.

The demand of the plaintiffs in September, after they had quitted the premises, constituted no conversion. A demand and refusal are not necessarily a conversion, but only evidence from which a conversion may be inferred. After the expiration of the lease the tenant's right of removal ceased. "Fixtures," remarks ALDERSON, B., in *Winshall v. Lloyd*, 2 Mees. & Wels. 450, "cannot become goods and chattels until the tenant has exercised his right of making them so, which he can only exercise during his possession. The moment that expires he cannot remove them, and trover cannot, therefore, be maintained for them." In *McIntosh v. Trotter*, 3 Mees. & Wels. 184, it was held that a lessee could not, even during his term, maintain trover for fixtures which were *attached to* the freehold, and that a sale of them was not a conversion. "Would trover lie for a crop of standing corn?" inquired PARKE, B. Nor could the tenant maintain trover against his landlord for not permitting him to enter after his lease had expired, to remove fixtures which he had erected: *Stockwell v. Marks*, 17 Me. 455.

When this demand was made, the defendant had neither actual nor constructive possession of the property demanded. He had no right to it nor control over it. He could not, therefore, comply with the demand. In such cases a demand and refusal only will not support an action of trover: *Kelsey v. Griswold*, 6 Barb. 436. A defendant, in an action of trover, cannot be deemed guilty of a conversion of the property upon evidence of a demand and refusal merely, unless the property was in some way subject to his control: *Yale v. Saunders*, 16 Vt. 243. So, if the defendant has not the power to comply: *Carr v. Clough*, 6 Foster, 280; *Boobier v. Boobier*, 39 Me. 406. Plaintiff non-suit.

*Richardson v. Rogers*, 37 Minn. 461; *Thorn v. Southerland*, 25 N. E. Rep. 362; *Friedlander v. Rider*, 47 N. W. Rep. 83; *Burke v. Hallis*, 98 Mass. 55; *Merit v. Judd*, 14 Cal. 59.

To the same point.

#### TIME FIXED BY CONTRACT.

##### WHITE'S APPEAL.

Supreme Court of Pennsylvania, 1849.

10 Pa. St. 252.

ROGERS, J. As this is a case between landlord and tenant, or rather a contest between the creditors of the latter, the claim to have the articles considered as personal property is received with latitude and indulgence. That which would otherwise be held as part of the realty, and inseparable from it, is treated, in favor of trade, as personalty, with all the incidents and liabilities of that species of property. Here, the engine and other machinery erected by the lessee to carry on the works, with the building, which is nothing more than a covering for the machinery, extending into the mines, by which the mines are worked, and are useless for any purpose unconnected with the working of the mines and transporting the coal are personal property. This is clear on the authority of *Lawton v. Salmon*, 1 H. Bl. 259, n.; *Elwes v. Maw*,

3 East. 53; 2 Pet. 137; *Lemar v. Miles*, 4 W. 330, and other cases. The building being attached to the freehold makes no difference: *Voorhis v. Freeman*, 2 W. & S. 116. Besides, if there was any doubt on general principles, that doubt is removed by the contract; for the lessors and lessee agree that all the steam engines, fixtures, and improvements erected by the lessee on the premises, from materials furnished by him, may be removed and taken away at the expiration of the lease, or other determination thereof, unless the lessors or their assigns elect to retain the same.

The sixth clause of the contract, as has been contended, does not interfere with this construction; for it extends to such houses only as may be required for the accommodation of the miners (obviously dwellings), opening and fitting up mines, making railroads, and other repairs or work done by the lessee about the demised premises. Such, according to the agreement, are to be made at the costs and charges of the lessee, without any claim on the lessors. The lessors assert no right to this machinery. It is admitted to be the property of the lessee. That consent will change property, otherwise real, into personal estate, is ruled in *Piper v. Martin*, 8 Barr, 211, and *Mitchell v. Freedley*, *ante*, 198. For, whether attached to the realty or not, or in whatever manner attached, is immaterial, when the parties agree to consider it personal property: 8 Barr, 211; 2 W. & S. 116. The building, then, and machinery, although fixtures, being chattels, are not the subject of a mechanics' lien, as is ruled in *Church & Carothers v. Griffith & Dixon*, decided at Pittsburgh at our last term. The Act of the 28th of April, 1840, has no bearing on this question, as its only effect is to modify the remedy for the recovery of a mechanics' lien, so that no greater estate, in the premises charged with the lien can be sold than was vested in the person in possession at the time the building was erected; and this, whether the lien was created before or since the passage of the Act: *Evans v. Montgomery*, 4 W. & S. 218; *O'Conner v. Warner*, *Ib.* 223. The Act curtails, but does not enlarge the right of the mechanics' lien creditor. On what species of

property the lien attaches is left as before the passage of the Act. As the cases cited show that this is not a case where mechanics are entitled to a lien, not being a building within the meaning of the Act, we are of opinion that the decree of the Court, awarding \$545.15, the amount of the mechanics' lien to Richard Hart, be reversed.

The record is remitted to the Court of Common Pleas, with orders to carry this decree into effect.

*Adams v. Goddard*, 48 Me. 212; *Hartwell v. Kelley*, 117 Mass. 235; *Alexander v. Tooley*, 13 Kan. 64.

## CONSTRUCTION OF THE RULE.

## 1. BETWEEN VENDOR AND VENDEE.

**Unless reserved by the grantor, fixtures will pass under the deed to the grantee.**

MILLER *v.* PLUMB.

Supreme Court of New York, 1827.

6 Cowen, 665.

WOODWORTH, J. The first objection is to the form of the record.

A continuance is entered from June to October Term; and then an award of venire to December Term, then next, at which day came the parties; and the jurors also came. This is sufficiently plain, and must be understood that the parties and jurors appeared at December Term. Although under the statute the continuance might have been awarded from June to December, without any award of venire, the present entry is substantially the same; and, at most, is only a miscontinuance, which is cured by the statute of jeofails: 3 John. 183.

The more important question is whether the potash kettles, being affixed to the freehold, passed with the land. If they did, the Court below erred; and the judgment must be reversed, unless the case falls within some of the qualifications or exceptions to the general rule. That rule appears to be well established; whatever is affixed to the freehold becomes part of it, and cannot be removed. Exceptions have been admitted between landlord and tenant; between tenant for life or in tail and the reversioner; yet the rule still holds between heir and executor: Bull. N. P. 34. In *Holmes v. Tremper*, 20 John. 30, Chief Justice SPENCER says, "when a farm is sold without any reservation the same rule would apply as to the right of the vendor to remove fixtures as exists between the heir and executor."



LORD ELLENBOROUGH, in the case of *Elwes v. Maw*, 3 East, 38, lays down the law relative to fixtures as arising between three classes of persons: 1. Between heir and executor. 2. Between the executors of tenant for life or in tail and the remainderman, or reversioner. 3. Between landlord and tenant; and observes that "in the first case the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel any thing which has been affixed thereto." In the latter case the reasons for relaxing the rule are obvious, upon motives of public policy. The tenant is thereby encouraged to make improvements; and the interest of trade promoted, while the landlord or reversioner has no cause to complain, inasmuch as the farm is restored to him in the same state as when he parted with it. A different rule would effectually check all improvements by the tenant, where it is known that at the end of the term they are to be surrendered to the landlord or the reversioner of tenant for life. But the case between heir and executor and vendor and vendee is widely different. The ancestor or vendor has the absolute control, not only of the land, but of the improvements. The heir and executor are both representatives of the ancestor; the vendor has an election to sell or not to sell the inheritance.

If he does elect to sell, he knows that by law the fixtures pass; and there is no good reason why that law should interpose in his behalf, and protect him against the loss of improvements which he has deliberately chosen to part with. It is for reasons of this kind, I apprehend, the old rule of law seems still to hold. In 7 Bac. 258, this is expressly recognized. The author observes that although in an action of trover by an executor against an heir for a cider-mill, tried at Worcester, before Lord C. B. COMYNS, his lordship was of opinion that it was personal estate, and directed the jury to find for the executor; yet Lord MANSFIELD has observed that that case, in all probability, turned upon a custom; and that where no circumstances of that kind arise the rule still holds in favor of the heir seems fully established by the decision of the

Court of King's Bench, in *Lawton v. Lawton*, Easter, 22 Geo. 3. The title of the case referred to seems to be *Lawton v. Salmon*, and is to be found in 1 H. Bl. 259, note *a*. As reported, I do not find that Lord MANSFIELD, in giving this opinion of the Court, says that the case before COMYNS, C. B., turned upon a custom. Yet the whole scope of the opinion is clearly against it. He recognizes the relaxation of the old rule as confined to cases between landlord and tenant, and tenant for life and remainderman; where, for the benefit of trade, and as an encouragement to lay out money in improving the estate, there has been a departure from the old rule, which is no injury to the remainderman, because he takes the estate in the same condition as if the thing in question had never been raised. He adds: "I cannot find that between heir and executor there has been any relaxation of this sort, except in the case of the cider-mill, which is not printed at large." It was a *nisi prius* decision, and evidently considered as not controlling the general law.

From this review it appears to me that the case of vendor and vendee rests on the same ground as that of heir and executor; and that the fixtures in such cases are not considered as personal property. I incline to think the evidence of conversion was sufficient, and that the plaintiff was entitled to recover for some articles not annexed to the freehold; but as damages were recovered for the whole, which cannot now be severed, the judgment in the Court below must be reversed, and a *venire de novo* awarded by the Common Pleas of Monroe.

Judgment reversed.

*Park v. Baker*, 7 Allen, 78; *Philbroke v. Ewing*, 97 Mass. 133.

To the same effect.

VENDOR TO OWNER IN COMMON.

BALDWIN *v.* BREED.

Supreme Court of Connecticut, 1843.

16 Conn. 60.

WILLIAMS, C. J. This was a writ of partition, in which the plaintiffs claimed that they and the defendants were equal owners of the land described, and the buildings, except a store thereon, which, they aver, belongs to them in severalty. The defendants plead, that they do not hold in manner and form, etc.; and a verdict is found for the plaintiffs.

The motion shows, that it was proved and admitted that Hancox, under whom the defendants claim, and Wright, under whom the plaintiffs claim, were tenants in common of the land claimed to be aparted; and that Wright erected the store upon the premises, at his sole expense. It is also claimed and not denied that the trial below proceeded upon the supposition that the plaintiffs had proved that the store was placed upon this land by Wright, with the consent of Hancox; and unless it were so, we think there could hardly have been a serious question in the case. We proceed, therefore, upon the ground that this fact constitutes part of the case; and the result to which a majority of the Court have arrived upon this point, makes it unnecessary to consider the other questions argued before us.

There is no claim that the building in question was not erected in the manner in which other buildings of this kind are erected—that is, it was permanently annexed to the freehold. Nor is it pretended that there was any contract between the parties relative to the removal or the ownership of this building, unless such contract can be inferred from the fact that it was built by one tenant in common, with the consent of his co-tenant. But the plaintiffs contend that the building thus erected belongs to him who placed it there; while the defendants contend that it follows the ownership of the land.

The general rule of law, that whatever is fixed to the realty becomes part of it, and cannot be removed, but partakes of all the incidents and properties of the freehold, is one of great antiquity: Co. Litt. 4, 53; Bull. N. P. 34. And the maxim, "*Cujus est solum ejus est usque ad cælum*" is not to be discarded as frivolous, when we consider how important it is in the designation of the ownership of property. And although in modern times it has been found necessary to introduce some exceptions to this rule, yet we agree with Justice COWEN that the actual annexation and total disconnection is the most certain and practical, and should therefore be maintained, except where plain authority or usage has created exceptions; and the general importance of the rule is so great that more evil will result from frittering it away by exceptions, than can arise from the hardship of particular cases: *Walker v. Sherman*, 20 Wend. 653-4.

The relaxation of the rule has been principally in cases between lessor and lessee, tenant for life and in tail and the remainderman: 3 Atk. 14; 16 Bul. N. P. 34. Here, the question does not arise between such parties, but between tenants in common, which case, says the learned Judge before cited, is to be decided on the same principle as if it had arisen between grantor and grantee, or as if partition had been effected by the parties by mutual deeds of bargain and sale. As between such parties, the doctrine of a fixture's making part of the real estate and passing with it is more extensively applied than between others: 20 Wend. 638. Now, if a deed had been given of this land, by one of the joint owners, and not a word said about the buildings, or if partition deeds had been made between them, it would seem as if there could be no doubt as to the effect of such deeds, and that the buildings would pass with the lands, as well as the fences: *Isham v. Morgan*, 9 Conn. 377. The title of a purchaser or creditor ought not to be qualified or impaired, for want of an inquiry as to which of the tenants in common planted the trees, set the hedges, or erected the fences or buildings: no authority has been shown and no usage proved in support of such

a claim. And when we consider the extreme uncertainty as to title which would result from the adoption of such a principle, and the embarrassments which would attend the purchaser and the creditors, together with the anxious care which our law has shown in making as public as possible the title to real estate, we cannot consent to incorporate the principle contended for, unless compelled by authority.

A little change in the situation of parties in this case will serve to show some of the difficulties which will result.

Hancox, we will suppose, wants to sell his interest in this land; the purchaser examines the title, and finds that Hancox and Wright are the owners, and have the record title; he goes no further, but completes the purchase; after which Wright comes out with a claim that this shop was his alone, and thus defeats the record title. Or a creditor of Hancox sets off one undivided half of this land and buildings as his; he must be deprived of the store, in consequence of a private agreement between the tenants in common. Or perhaps a creditor of Wright sets off one-half the land and buildings on execution, as the estate of Wright; Wright may say that as this was his sole property, the creditor could not take one undivided half; or perhaps might claim that it ought to have been sold at the post as his personal property.

When one man voluntarily erects a building upon the land of another, without his consent, he acquires no right in the land, and retains none in the building, but the building becomes the property of him who owns the freehold: *Elwes v. Maw*, 3 East, 48; *Washburn v. Sproat*, 16 Mass. 449; 5 Day, 467. When it is erected by consent of the owner, different consequences may result; though by strict operation of law, the title vests in the owner of the land. Such, we understand, was the doctrine of this Court in *Benedict v. Benedict*. Judge SWIFT says, in strict law, the house belongs to the owner of the soil; and the same principle is advanced by C. J. PARSONS, in the case of *Wells v. Banister*, who says that by strict operation of law the father (on whose land the son had, by his consent, built a house) might disturb the son in the pos-

session of the house, and remove him from it: 4 Mass. 514. It is true that a Court of Law in Massachusetts, in the case above cited, held, that a house so built was personal property in the builder; but it is to be recollected that there was then no Court of Chancery in that State; of course, Courts of Law must adopt, to some extent, the principles of Courts of Equity.

In *Prince v. Case*, 10 Conn. 378, we alluded to these cases of *Benedict v. Benedict* and *Wells v. Banister*, as somewhat opposed to each other, without an intimation that the former decision was incorrect. In *Parker v. Redfield*, 10 Conn. 490, where the lessor had agreed with the lessee, that he might erect buildings on the land, and, at the end of the term, remove them, this Court held that the lessee had an interest in the building entirely distinct from that of the lessor, and that this interest was a subject of taxation. And the Court say, the buildings are treated [by the parties] as personal property, and are placed under the control of the lessee, as any other personal property. As the question there was a mere question of a right to tax, perhaps the result would have been the same, whether the property was treated as real or personal at law. That the Court did not intend to overrule or impair the authority of *Benedict v. Benedict* is apparent from the fact that this case is not alluded to at all in the discussion. And if that case is law, we are not able to discern any ground the plaintiffs can have to maintain this action at law. There, the Court say a Court of Chancery will give ample relief according to the circumstances of the case, and will apportion justice to the parties. A Court of Chancery can so mold such agreements as to do entire justice; as where a party claimed a parol contract to be carried into effect on the ground of part performance, but the terms of the agreement could not be distinctly made out; but as possession had been taken and improvements made, the Court allowed a reasonable compensation for beneficial and lasting improvements: *Packhurst v. Van Courtland*, 1 Johns. Ch. R. 274.

But in the case before us, we see no ground even for the interference of a Court of Chancery. No agreement is proved as

in *Parker v. Redfield*, that the shop should belong to Wright, or that he might remove it; nor is there anything to show that either party contemplated that it should be the separate property of Wright, unless it can be inferred from the consent of Hancox, asked by Wright. Does the consent of Hancox fairly authorize such an inference? For aught we know, Hancox may have consented because he had claims for some other buildings erected, or improvements made by him. The fact of Hancox's consent would no more prove that he intended the buildings should be the sole property of Wright than Wright's having consented that Hancox should erect an expensive iron fence, or a hawthorne hedge, would prove that he expected such hedge or fence should be the sole property of Hancox. For necessary and reasonable improvements made by one tenant in common, the other must be accountable; but when unusual or unnecessary expenses are incurred, it might be otherwise if done without the consent of the co-tenant. Accordingly, it may become important in reference to the account to be settled that when any extraordinary expenses are to be incurred, consent should be obtained. And this, we think, accounts entirely for the negotiations between these parties. Each had a right to occupy any part of this land, or to make improvements upon it; but improvements upon the common property must be for the common benefit: and if desired by both, must be at the joint expense. If a person claims that his case is an exception from this rule, the least that can be required of him is to show that the contract under which he claims this, demands such a construction: we cannot infer it from the naked fact that the co-tenant consented to his act.

Whatever construction is given to cases where buildings are placed on lands of others, we do not think it can control a case of this kind, where there is a common interest. In *Parker v. Redfield*, the Court proceeded entirely upon the ground that there was no common interest between the lessee and the lessor, and distinguish that case from *Osborn v. Humphrey*, by saying that there the buildings were evidently erected with a view to their permanent continuance; and there is no intima-

tion of an ownership in them separate and distinct from the ownership in the land. They were in fact a part of the land, as much as fences or any other improvements: 10 Conn. 498. The case of *Osborn v. Humphrey* was the ordinary case of a tenant for nine hundred and ninety-nine years erecting buildings on the leased land; and the Court say the buildings are attached to the land: 7 Conn. 340. And in *Winn v. Ingilby*, 5 B. & Ald. 625 (7 E. C. L. 214), the Court of King's Bench say that fixtures erected by the owner of the freehold cannot be taken in execution by the sheriff, though they might have been taken, if erected by the tenant. In the absence, then, of any special agreement between the parties, we think neither a Court of Law nor a Court of Chancery could treat this store as the separate property of one of these tenants in common. And the remark of C. J. TILGHMAN, in *Lyle v. Ducomb*, 5 Binn. 588, is entirely applicable to this case: "The idea of separating the building from the ground on which it stands is altogether novel, and cannot be carried into effect without great difficulty."

It has been suggested that the committee who may go out to make partition can settle the proportions, and adjust this matter in such a manner as to do justice between the parties. But the interest and proportions of the respective parties are settled by the verdict of the jury in this case, and must be conclusive upon the committee. The declaration alleges that the plaintiffs and defendants are joint owners in equal moieties of this land; and that the plaintiffs are sole owners of this store. This the defendants deny; and the jury have found for the plaintiffs. Now the committee must take this fact for truth, as found, or they may find directly contrary to the verdict of the jury; which cannot be allowed, any more than auditors can find that the defendant was never bailiff and receiver. If, therefore, the plaintiffs are not the sole owners of this store, manifest injustice is done by this verdict.

A majority of the Court, therefore, are of opinion that the plaintiffs ought not to retain it; and advise a new trial.

*Parsons v. Copeland*, 38 Me. 537; *Plummer v. Plummer*, 30 N. H. 569.



To the same effect.

UNDER CONTRACT OF PURCHASE.

HEMENWAY *v.* CUTLER.

Supreme Judicial Court of Maine, 1863.

51 Me. 407.

APPLETON, C. J. The levy, under which the demandant claims, was made upon the demanded premises as the real estate of William Hicks, in whom the title appeared by the record to be. But Hicks had, many years before, conveyed his interest in the same to Thomas Murray, by an unrecorded deed, from whom the title passed, by various mesne conveyances, to one Jones, who gave a bond for a deed to the tenant.

The tenant, Cutler, having a bond for a deed, entered into the occupation of the premises in dispute, and, while so in occupation, erected a barn thereon, which is specially excepted from the levy as personal property belonging to him. If the barn is to be deemed personal property, it was rightfully excepted. If it was real estate, or belonged to the realty, the levy was erroneous, for it was manifest that its value was excluded from the estimate of the appraisers. A creditor cannot, by making a levy, change the character of his debtor's estate, and convert a part of it into personal property, by taking the land under the buildings and leaving the buildings as personal estate: *Grover v. Howard*, 31 Me. 546; *Jewett v. Whitney*, 43 Me. 243.

It is well settled that erections made by a mortgagor, or one occupying land under a bond for a deed, are to be regarded as real estate, and are not removable by the occupant as personal property: *Corliss v. McLagin*, 29 Me. 115; *Butler v. Page*, 7 Met. 40; *King v. Johnson*, 7 Gray, 239; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306.

As between Cutler and Jones, the barn must be deemed as permanently a part of the realty.

Erections made voluntarily and without a contract, or without the consent of the owner, become part of the real estate,

and inure to the benefit of the owner of the fee: *Pierce v. Goddard*, 22 Pick. 559; *Sudbury v. Jones*, 8 Cush. 189.

As between Cutler and Hicks, if the latter was the owner of the soil, the former could not claim the barn as personal property.

But it is argued that the tenant held adversely to Hicks, and would, therefore, be entitled to betterments. This may be true, but, if so, it does not give the tenant the right of removal, or make the erections by him personal property. They are part of the realty, for which the owner of the fee must pay, if, in a suit for the recovery of his land, he makes an election so to do. If the demandant elects to abandon, they, as a part of the realty, belong to the tenant upon his payment of their estimated value. If, after an abandonment by the demandant, the tenant fails to pay the estimated value of the land within the time and according to the provisions of the statute, then the improvements pass to and vest in the owner of the fee. In no event are they to be regarded as personal property, even when the tenant is evicted without suit: R. S., 1857, c. 104. In that case the tenant may recover the value of his improvements, but they are a part of the realty, and belong to the owner of the fee. The remedy of the tenant is by suit, and not by removing such of his improvements as may be removable.

In any aspect of the case, as presented, the barn erected by the tenant on the land in controversy cannot be regarded as his personal property. The levy, therefore was erroneous, by excluding its value from the appraisement.

Plaintiff non-suit.

*Poor v. Oakman*, 104 Mass. 309; *Ogden v. Stock*, 34 Ill. 522; *Bodlen et al. v. Barker*, 4 Kan. 446. *Contra*: *Raymond v. White*, 7 Cowen, 319; *Rosse's Appeal*, 9 Pa. St. 496.

## VENDOR'S GRANT OF BUILDING.

A grant of the buildings will include the land on which the buildings stand.

GREENWOOD *v.* MURDOCK.

Supreme Judicial Court of Massachusetts, 1851.

9 Gray, 20.

BIGELOW, J. The estate demised to Harwood by the inhabitants of Winchendon for the term of nine hundred and ninety-nine years is in these proceedings to be treated as an estate in fee simple, by virtue of the Rev. Sts., c. 60, § 18, which provide that leasehold estates demised for one hundred years or more, so long as fifty years of the term remain unexpired, shall be regarded as an estate in fee simple, "as to everything concerning the redemption thereof when mortgaged."

The only question raised by the plaintiff is, whether the defendant acquired any interest in the land by virtue of the indenture of mortgage of August 5, 1850, between Harwood and Morse, which has been assigned to the defendant, or whether it was a conveyance only of the materials used in the construction of the building.

It seems to us that the terms of the grant bring it within the numerous cases in which it has been decided that land will pass by a deed which does not contain any description of the land, but which grants only the structure which is erected upon it, so that a grant of a barn, a shop, a house, a well, a mill, will convey a title to the land under it and necessary to its enjoyment and use: *Cheshire v. Shutesbury*, 7 Met. 566; *Forbush v. Lombard*, 13 Met. 109; *Johnson v. Raynor*, 6 Gray, 110.

In the present case the grant is of all the right, title, and interest which the grantor now has in the foundation or stonework of the building, and also of all the "right, title, and interest" which the grantor "may have in and unto said building during its erection and completion, and after it is completed, as mentioned in said lease." Now the right which

the grantor had in said foundation, stone-work, and building, under the lease, was not merely or mostly a right to the materials of which they were composed, but the more valuable right of having them on the premises as part of a structure, with a right to use and occupy them for a long period of time. It was a grant therefore of his right to the use and occupation of the land, as well as of the building or of the portion of it then erected.

Such we think was clearly the intent of the parties. It is not reasonable to suppose that the grantee, when advancing money to complete the building, would take as security for his advances a mortgage on the materials only, which were to become part of the realty, and which, by the terms of the lease, when annexed to the freehold, he would have no right to remove or in any way render available as security for his loan.

We are therefore of opinion that the respondent has a right to receive from the plaintiff for the redemption of the premises the advances made under said indenture, and the case must go to a master to determine the amount.

*Sherman v. Williams*, 113 Mass. 481 ; *Gear v. Barnum*, 37 Conn. 229.

## 2. MORTGAGOR AND MORTGAGEE.

The rule applying in case of vendor and vendee applies also to mortgagor and mortgagee.

### WINSLOW *v.* MERCHANTS' INS. CO.

Supreme Judicial Court of Massachusetts, 1842.

4 Metc. 310.

SHAW, C. J. The Court are of opinion that the steam engine and boilers, and all the engines and frames adapted to be moved and used by the steam engine, by means of connecting wheels, bands or other gearing, as between mortgagor and mortgagee, are fixtures, or in the nature of fixtures, and constituted a part of the realty ; and that as all these fixtures were annexed to and made part of the realty by the mortgagor

they are part of the mortgaged premises, and passed by the first mortgage to the defendants.

A different rule may exist in regard to the respective rights of tenant and landlord, tenant for life and remainderman or reversioner, and generally when one has a temporary and not a permanent interest in land. In those cases the rule as to what shall constitute fixtures is much relaxed in favor of those who make improvements on the real estate of others for the purposes of trade or other temporary use and enjoyment: *Gaffield v. Hapgood*, 17 Pick. 192. But the case of mortgagor and mortgagee stands upon a different footing. The mortgagor, to most purposes, is regarded as the owner of the estate; indeed, he is so regarded to all purposes, except so far as it is necessary to recognize the mortgagee as legal owner, for the purposes of his security. The improvements, therefore, which the mortgagor, remaining in the possession and enjoyment of the mortgaged premises, makes upon them, in contemplation of law he makes for himself and to enhance the general value of the estate, and not for its temporary enjoyment; whereas a tenant, making the same improvements upon the estate of another, with a view to its temporary enjoyment, must be presumed to do it for himself, and not for the purpose of enhancing the value of the freehold. This rule, of course, will apply only to that class of improvements consisting of articles added and more or less permanently affixed to the realty, in regard to which it is doubtful whether they are thereby made part of the realty or not, and when that question is to be decided by the presumed intent of the party making them. Take, for instance, the case of a dye-kettle set in brick-work, which is for the time annexed to the freehold, but which may be removed without essential injury to the building, and so as to leave the premises in as good a condition as if it had not been set. If so set by an owner of the fee, for his own use, it would, we think, be regarded as a fixture, an addition made to the realty by its owner, as an improvement, and would pass to the heir by descent, or to the devisee by will. But if the same addition had been made by a tenant for years, for the purpose of carrying

on his own business, we think he would have a right to remove it, provided he exercise that right whilst he has the rightful possession of the estate—that is, before the expiration of his term : 17 Pick. *ubi sup.*

Supposing the point to be clear, on the one side, as between heir and executor, and on the other, as between tenant and landlord, how does it stand as between mortgagor and mortgagee? In the case of *Union Bank v. Emerson*, 15 Mass. 159, it was held that such a kettle, set by the owner of the freehold, before the mortgage, could not be removed by the mortgagor, or taken as his personal property, but passed by the deed to the mortgagee. It was considered an immaterial fact that the mortgage deed did not mention appurtenances; probably upon the ground that if the kettle was an appurtenance, and *a fortiori*, if it was parcel, it would pass without express words : *Kent v. Waite*, 10 Pick. 138; and if it was neither, those words would not aid it. We are aware that in giving the opinion in that case it was stated by the Court that if the defendant, after making the mortgage, had put in the kettle, they would have considered him authorized to remove it before delivering possession to the plaintiffs. There is manifestly some mistake in this statement. It was *not the defendant* who made the mortgage; he was a purchaser of the kettle, the same having been removed by the mortgagor, after the plaintiffs took possession, and been sold by him to the defendant. But supposing, as is rather to be inferred from the context, that if the kettle had been put in by the mortgagor after the mortgage was made, the mortgagor would have had a right to remove it; it is to be remarked that no such point was decided by the Court, nor was it necessary, upon the facts of that case; and from the whole tenor of this very short report it seems probable that the point was not much considered.

In the recent case of *Noble v. Bosworth*, 19 Pick, 314, it was held that such kettles erected by the owner were to be deemed part of the realty and to have passed by a general deed of the estate, unless specially excepted. There the case of *Union Bank v. Emerson* was alluded to; but the point was not then

material, and the Court expressly avoided giving any opinion, either affirming or calling in question its authority as to the present point of inquiry, by stating that whatever doubt there might be as to such fixtures erected by a tenant on leased premises, *or by a mortgagor*, after the estate had been mortgaged, there was none when erected by an owner.

It is obvious that this question cannot arise where there is any express stipulation in the mortgage deed declaring either that such improvements to be made, and which are in their nature equivocal, shall or shall not be deemed fixtures, and be bound as part of the realty. The question is, what is the reasonable and legal construction of a deed, granting an estate in mortgage, in the usual terms, where there is no stipulation on the subject? Such a deed must, of course, include all additions which become *de facto* part of the realty, and which are not in their nature equivocal; because a title to the whole includes every part. In regard to articles doubtful in their nature, we have already stated as our opinion that if added by the mortgagor it is to be considered as done by way of permanent improvement, for the general benefit of the estate, and not for its temporary enjoyment: *Hunt v. Hunt*, 14 Pick. 386. One of the objects, and indeed one of the most usual purposes of mortgaging real estate, is to enable the owner to raise money to be expended on its improvement. If such improvements consist in actual fixtures, not doubtful in their nature, they go, of course, to the benefit and security of the mortgagee, by increasing the value of the pledge. The expectation of such improvement and such increased value often enter into the consideration of the parties in estimating the value of the property to be bound, and its sufficiency as security for the money advanced. And we think the same rule must apply to those articles which in their own nature are doubtful, whether actual fixtures or not, on the ground of the presumed intention of the parties. A presumption arises from the relation in which they stand that such improvements are intended to be permanent and not temporary, and that the freehold and the improvements intended to be made upon it

are not to be severed, but to constitute one entire security. The mortgage is usually but a collateral security for money which the mortgagor binds himself to pay, and is therefore a hypothecation only, and not an alienation of the mortgaged estate. And in this respect the distinction between the tenant for years and the mortgagor is broad and obvious. The tenant for years can have no benefit from his improvements after the expiration of his term but by his right to remove them when they are capable of removal; but the mortgagor has only to pay his debt, as he is bound to do, and as it is presumed he intends to do, and then he has all the benefit of his improvements in the enhanced value of the estate to which they have been annexed. The latter, therefore, may be presumed to have intended to annex the improvements to the freehold and make them permanent fixtures, whilst the former must be presumed, from his obvious interest, to erect the improvements for his own temporary accommodation during his term, intending to remove them before its expiration.

The case of *Gale v. Ward*, 14 Mass. 352, is not, we think, an authority opposed to this opinion; because it is manifest that the Court, in that case, regarded the carding-machines, though ponderous and bulky, as essentially personal property which might have been attached and removed as the personal property of the owner, even though there had been no mortgage; and they had been erected by the owner in his own mill, for his own use.

As to what shall be deemed fixtures and part of the realty, when the question does not arise as between landlord and tenant, or tenant for life and remainderman, in regard to improvements made by the tenant, it is difficult to lay down any general rule which shall constitute a criterion. The rule that objects must be actually and firmly affixed to the freehold to become realty, or otherwise to be considered personalty, is far from constituting such criterion. Doors, window-blinds, and shutters capable of being removed without the slightest damage to a house, and even though at the time of a convey-



ance, an attachment or a mortgage, actually detached, would be deemed, we suppose, a part of the house and pass with it. And so, we presume, mirrors, wardrobes, and other heavy articles of furniture, though fastened to the walls by screws, with considerable firmness, must be regarded as chattels. The difficulty is somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined, as to be occasionally connected or disengaged as the objects to be accomplished may require. In general terms, we think it may be said that when a building is erected as a mill, and the water works, or steam works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment, or mortgage attached to the mill, are yet parts of it, and pass with it by a conveyance, mortgage, or attachment: *Powell v. Monson & Brimfield Manuf. Co.*, 3 Mason, 466; *Farrar v. Stackpole*, 6 Greenl. 154; *Gray v. Holdship*, 17 S. & R. 415; *Voorhis v. Freeman*, 2 Watts & Serg. 116.

In the present case, we are of opinion, upon the evidence submitted to the Court, that the engine and boilers and the machines for working iron upon which they operated, considering the manner in which they were fitted and adapted to the mill, were fixtures and part of the realty, and were, of course, covered by a mortgage of the real estate.

We are also of opinion that all articles of stock, such as iron and coal, and all materials to be wrought, and the hand tools, and all implements not driven by the steam engine, and articles not annexed to the building, nor imbedded in the ground, nor constituting parts of such mill, are to be deemed personalty, and not realty, and did not pass by the first mortgage to the defendants. †

In regard to the second mortgage, as far as it is a mortgage of real estate, it is not material whether the first registration was good or not; because the plaintiffs have no claim to the real estate. But it is contended on the part of the defendants

that the mortgage deed to them of May 26, 1836, was a mortgage both of real and personal property; that it was duly registered as a mortgage of personal property, in the city clerk's office, long before the plaintiffs' mortgage, and was therefore sufficient to bind the personal property.

We think there is a satisfactory answer to this claim furnished by the facts. This deed purported to be a second mortgage of the real estate before mortgaged to the defendants with all and singular the machinery, tools, goods, chattels, and other property therein contained, together with all the machinery, tools, apparatus, and other property, whether fixtures or otherwise, *now being* or remaining on the premises, and also all other machinery, engines, tools, and other property *now contemplated to be placed* in said building; said Pond, the mortgagor, warranting and agreeing that said instrument should be effectual to create a lien or mortgage on the machinery and tools afterward to be placed in said building; and he moreover stipulated, to remove all doubt, after the machinery and tools should have been actually placed therein, to execute any instrument which should be effectual and sufficient to create a lien and mortgage thereon.

In point of fact, at the time of executing this instrument, the building had not been erected, and no machinery or tools whatever were then placed in it. In truth, a considerable part of those claimed in this action were not then in existence, but were manufactured afterward. "Articles contemplated to be placed therein," though then in existence, without any schedule, enumeration, or specification whatever, is, as a description, far too indefinite and uncertain to constitute a lien upon the articles afterward actually placed in the building. The circumstance that some of the articles were in use by the mortgagor at a shop occupied by him in Water Street, and were afterward removed to the shop in Hawley Street cannot bring them within the description, vague as it is; because many of the articles so used at the shop in Water Street were not removed; others were purchased or manufactured afterward; and therefore it still remains wholly uncertain which of them

were "contemplated" to be put into the new building. The stipulation of the mortgagor to execute a further instrument of hypothecation when the articles should be put in, and thus made certain, was a good executory contract, binding upon the covenantor personally, and for a breach of which he might have been liable in damages, but not an executed contract, constituting a lien *de facto* upon articles not then bound by the mortgage.

It was objected to the plaintiffs' mortgage that it was invalid, because there was no schedule annexed, according to a stipulation contained in it. But the Court are of opinion that it was good and available for all the articles which were in the shop at the time it was executed, so far as they remained and could be identified, although no schedule was annexed. The reference to a schedule to be annexed was not to limit or restrain the generality of the previous description of the property, but it was to be inserted for greater certainty and exactness, and the better to enable the mortgagee to identify the articles. It was not, therefore, essential to the validity of the mortgage.

This case was adjusted by the parties on the principles of the foregoing opinion, and judgment was entered for the plaintiffs for the sum of \$1,161.05.

Harris *v.* Haynes, 34 Vt. 220; Quinby *v.* Manhattan Cloth, etc., Co., 24 N. J. Eq. 260; Crane *v.* Bigham, 11 N. J. Eq. 29.

To the same effect.

SHERIFF'S DEED IN FORECLOSURE.

SANDS *v.* PFEIFFER.

Supreme Court of California, 1858.

10 Cal. 263.

FIELD, J., after stating the facts, delivered the opinion of the Court. TERRY, C. J., concurring.

The material questions for consideration are: *first*, whether the machinery in controversy was so fixed to the real property as to pass by the sheriff's deed; and, *second*, if so, whether upon its severance it became personal property so as to be recoverable in the present action.

The general rule of law is that whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate. Though the rule has been in modern times greatly relaxed as between landlord and tenant, in relation to things affixed for the purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use, it remains in full force as between vendor and vendee. As a general thing a tenant may remove what he has added when he can do so without injury to the estate, unless it has become by its manner of addition an integral part of the original premises: 2 Kent, 343; 1 Parsons on Con. 431, and cases cited in note. But not so a vendor; as against him all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance. Thus, potash kettles appertaining to a building for manufacturing ashes: *Miller v. Plumb*, 6 Cow. 665; a cotton-gin fixed in its place: *Bratton v. Clawson*, 2 Strob. 478; a steam engine, to drive a bark-mill: *Oves v. Ogelsby*, 7 Watts, 106; kettles set in brick, in dyeing and print works: *Despatch Line of Packets v. Belamy Co.*, 12 N. H. 207; *Union Bank v. Emerson*, 15 Mass. 159; iron stoves fixed to the brick-work of chimneys: *Goddard v. Chase*, 7 Mass. 432, and wainscot-work, fixed and dor-

mant tables are held to pass to the vendee under a conveyance of the land.

In *Elwes v. Maw*, 3 East, 38, ELLENBOROUGH says that questions respecting the right to fixtures principally arise between three classes of persons: 1st, between the heir and executor; 2d, between the executors of tenants for life or in tail and the remainderman and reversioner; and, 3d, between landlord and tenant; and observes that "as between heir and executor the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto," and Mr. Justice STORY, in *Powell v. Monson and Brimfield Mfg. Co.*, 3 Mason, 465, after stating the general rule that whatever is once annexed to the freehold becomes parcel thereof, and cannot be afterward severed but by him who is entitled to the inheritance, remarks, that "as between heir and executor, the rule has never been relaxed, unless the case of the cider-mill, cited in *Lawton v. Lawton*, 3 Atk. 13, is an exception, which may, perhaps, as the note there suggests, have turned upon a custom, or, as Lord ELLENBOROUGH, in *Elwes v. Maw*, 3 East, 38, considers it, may be deemed a mixed case between enjoying the profits of land and carrying on a species of trade."

The same strict rule which applies between heir and executor applies equally between vendor and vendee and between mortgagor and mortgagee: 2 Kent, 346; *Day v. Perkins*, 2 Sand. Ch. 364.

The engine and boilers, etc., severed from the mill, in the present case were clearly fixtures within the definition of the term as given by the adjudged cases, and were covered by the mortgage, and passed to the plaintiffs with the deed of the sheriff. They were permanently fastened to the building, which had its foundation in the ground, and they could not be removed without injury to the premises: *Amos and Ferrard*, 2.

Pfeiffer possessed the right to the use and possession of the premises until the execution of the deed, but he possessed no right to despoil the property of the fixtures. The deed took

effect by relation, at the date of the mortgage, and passed fixtures subsequently annexed by the mortgagor: *Winslow v. Merchants' Ins. Co.*, 4 Met. 313. By their wrongful severance the present action was properly brought: *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Cresson v. Stout*, 17 John. 116; *Mooers v. Wait et al.*, 3 Wend. 108; *Schermerhorn v. Buell*, 4 Denio, 425; *Morgan v. Varick*, 8 Wend. 591.

It is true the plaintiffs, had they been aware of the intentions of Pfeiffer, might have applied to the Court and obtained an injunction restraining the removal, under § 261 of the Practice Act, but they were not restricted to this course. The remedy afforded by the section is only preventive; it is not exclusive of any other remedy.

The defendant, Schleischer, is the only appellant, and he admits in his answer that he was in possession of the specific articles recovered of him. The objection to the misjoinder of the defendant, Pfeiffer, should have been taken in the Court below; it cannot be taken in this Court for the first time.

Judgment affirmed.

To the same effect.

### 3. HEIR AND EXECUTOR OR ADMINISTRATOR.

KINSELL *v.* BILLINGS.

Supreme Court of Iowa, 1872.

35 Iowa, 154.

MILLER, J. On the trial the defendant requested the Court to give the following, among other instructions, viz.: "If you find from the evidence that said property, when defendant took possession of it, was attached to the real estate in the form of a saw-mill, dam, etc., it was a part of and belonging to the real estate, unless you further find that it was placed there by virtue of a lease, with a right to remove at the end of said lease, or was put there by consent of or with the knowledge of the owner of the real estate, and without his objection; and

unless it was so put there under a lease or with the consent or knowledge of the owner of the said real estate, and without his objection, it was, in contemplation of law, a part of the real estate; and in order to entitle plaintiff to recover he must show such lease from said owner, or knowledge on his part of said improvements."

The Court refused to give the instruction, and this ruling is assigned as error. This instruction should have been given. The evidence tended very strongly, to say the least, to show that the mill was a part of the realty. It was erected by one who, at the time, claimed to be owner of the land on which it was situated, and it was built in a permanent manner, "partly in the bed of the river and partly in the bank;" the injury to the mill, therefore, would be an injury to the real property, and the right of action would accrue to the heir, and not to the administrator. As between landlord and tenant, the rule of law, that whatever is annexed to the realty in the form of buildings, etc., becomes a part thereof, is liberally construed in favor of the tenant; but, as between the heir and the executor or administrator, the rule obtains with the greatest rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold: 2 Kent's Com., § 25, pp. 344, 345; 1 Wash. on Real Prop., 10-12, and cases cited.

It is too well understood to require the citation of authorities that the real estate of the intestate descends to the heirs-at-law, and that the personal property only goes to the administrator, unless the latter proves inadequate for the payment of the debts of the intestate when under the statute the administrator may be empowered to sell enough of the real property to make up the deficit. See Rev., §§ 2374, 2375. An administrator has no right to receive the rents of real property accruing after the death of the intestate: *Foteaux v. Lepage*, 6 Iowa, 123, 130; *Lepage v. McNamara*, 5 Ib. 124; *Beezley v. Burgett*, 15 Ib. 192. At the common law the administrator had no control over the real estate or over the rents and profits thereof, and such is still the law, except where the statute provides otherwise.

Under the statute the administrator may maintain an action of forcible entry (Rev., § 3954); and by chapter 139 of Laws of 1866 it is provided, that "if there be no heirs or devisees of a testator or intestate present, or competent to take possession of the real estate left by such testator or intestate, the executor or administrator of his personal estate may, *as trustee for the proper heirs or devisees*, take possession of such real estate, and demand and receive the rents and profits arising therefrom, and sue for and receive the same, and do all other acts and things relating to such real estate which may be for the benefit of the person entitled thereto, and consistent with their rights and interests:" § 3.

Whether, under this provision of the statute, an action for an injury to the real estate may be maintained by the executor or administrator, we need not decide, for it is apparent that this action is not intended to be brought thereunder. The administrator or executor may, "*as trustee for the proper heirs or devisees*," take possession and collect the rents and profits, etc., only when there are "no heirs or devisees of the testator or intestate present or competent to take possession."

When acting under this statute the executor or administrator does so "as trustee for the proper heirs or devisees," and for their use and benefit, and not simply in his capacity as executor or administrator; and when suing under this provision, the existence of the facts which authorize him to sue for their benefit should be averred, viz.: That there are no heirs or devisees present or competent (as the case may be) to take possession.

The judgment of the Circuit Court is reversed.

Tuttle v. Robinson, 33 N. H. 104; Goddard v. Chase, 7 Mass. 432; Bainway v. Cobb, 99 Mass. 437; Clark v. Burnside, 15 Ill. 62; Fay v. Mussel, 13 Gray, 53.



To the same effect.

4. DEVISEE AND EXECUTOR.

BRADNER *v.* FAULKNER.

Supreme Court of New York, 1866.

34 N. Y. 347.

PECKHAM, J. The question presented here is, who ultimately owned this crop of wheat? As I understand the opinion of the learned Justice who tried this cause (none was given at the General Term), he held that this wheat did not pass to the plaintiff by the devise to her of the farm; that since the Revised Statutes it would go to the executor, to be applied and distributed under other provisions of the will.

The Revised Statutes declare that "crops growing on the land of the deceased at the time of his death shall be assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate of the testator or intestate, and shall be included in the inventory thereof:" 2 R. S., 82, § 6; also sub. 5.

This is plain and imperative language. Comment or illustration cannot make it plainer, and there is nothing in this case to prevent its application to this crop of wheat. There is no limitation or qualification to this statute rule. It applies as well to devisees as to heirs; no exception is made of either, and there is no reason for an exception. It is evident that the Legislature had devisees in contemplation in these provisions, as their rights are regulated in this chapter in various respects. The language of this provision being plain and clear, there is no occasion to resort to the notes of the revisers, or to any special rules of construction, to learn the legislative intent, though I think they all harmonize with the plain language of the Act.

For what purpose shall these assets go to the executors?

The statute further provides that, "if necessary for the payment of debts and legacies," the personal property of the deceased shall be sold.

That in making such sales, such articles "as are not specifically bequeathed" shall be first sold: 2 R. S., 87, §§ 27, 28.

In this case there seem to have been no debts, and the sale of this wheat, it is not pretended nor claimed, was necessary for the payment of legacies.

When it legally appeared that this wheat was not necessary for the payment of debts or legacies, the executor should then dispose of it as directed by the will.

To whom, then, did the wheat ultimately belong?

In my judgment, it belonged to the devisee of the land.

At common law, crops growing on land passed to the devisee of the land. This was conceded on the argument. They passed to the devisee upon the presumed intention of the testator, that he who took the land should take the crops which belong to it: *West v. Moore*, 8 East, 339; 1 Willard Ex. 660, and authorities there referred to. In such case, the crops did not go to the executors. This "presumed intention" of the testator might be rebutted by slight intimations in the will of a different purpose.

As, where he gave all his personal property to his executor, it was held to carry the crops to him, as against the devisee of the land: 1 Willard Ex. 602, note s.

There is nothing in this will to alter or affect the presumed intention of the testator.

The statute has not assumed to alter any rule of construction as to wills. All the alteration it has made, so far as it touches this case, is, that it has made certain things assets to go to the executor which before went to the devisee.

In the first subdivision of the sixth section it makes land held for the life of another, though specially devised, assets to go to the executor.

That land is made personal property at least for that, if not for all purposes. But if not wanted for the payment of debts or legacies, of course, when that legally appears, it goes to the devisee.

So do these crops. The statute has in no respect changed their character. They are personal property. They were so

before the statute. They are so still—only now, in all cases, whether bequeathed or devised, they primarily go to the executors, to be used, if necessary, for the payment of debts and legacies. If not necessary for that purpose, then they go to the beneficiary under the will.

But the same language that would devise or bequeath these crops before the statute, will devise or bequeath them now.

In truth, there is just as much propriety in these crops passing by a devise as by a deed in the land, though the principle upon which they pass is not the same. The rule, however, being well settled that they do pass, it is not important here to inquire as to its propriety.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

*Sherman v. Willett*, 42 N. Y. 146; *Dennett v. Hopkinson*, 63 Me. 350.

## INCORPOREAL HEREDITAMENTS.

"An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within the same:" 2 Blk. Ch. III, page 19.

1. Easements.
2. Franchises.
3. Rents.

## I

## EASEMENTS.

"An easement is an incorporeal hereditament, susceptible of a permanent enjoyment by one man in another's *land*, such as that of a way, or light, or air:" 1 Wash. R. P. 661.

PIERCE v. KEATOR.

Court of Appeals of New York, 1877.

70 N. Y. 419.

CHURCH, C. J. It is important to determine the nature of the right reserved in the deed of Pierce and wife to the New York & Oswego Midland Railroad Company. The reservation is in the following words: "Said parties of the first part also to have the privilege of mowing and cultivating the surplus ground of said strip of land not required for railroad purposes." The appellant contends that this right of mowing and cultivating was an easement appurtenant to the remaining portion of the farm, and would pass to the grantee of the remainder of the farm without description or specification. The term easement has sometimes been applied to rights in or over land without strict regard to the recognized distinctions between the different kind or class of rights. These distinc-

tions may be impaired and even obliterated by the circumstances attending, and the manner of their creation.

An easement is a liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil. The essential qualities of easements are: First. They are incorporeal. Second. They are imposed upon corporeal property. Third. They confer no right to a participation in the profits arising from such property, and, Fourth. There must be two distinct tenements, the *dominant*, to which the right belongs, and the *servient*, upon which the obligation rests: Bouvier's Dict. Title, Easements; Wash. on Easements, Ch. 1, § 1, 4 Sandf. Chy. R. 89.

The right to profits, denominated *profit a prendre*, consists of a right to take a part of the soil or produce of the land, in which there is a supposable value. It is, in its nature, corporeal, and is capable of livery, while easements are not, and may exist independently without connection with or being appendant to other property: 2 Wash. on Real Property, 26 (3d ed.), 276; 22 Wend. 433. The right reserved in the deed of Pierce and wife was a right to profits in the land, and was not, therefore, in strictness, an easement. From the nature of the right, we can see no connection between it and the ownership of the farm. The right to mow and cultivate this strip was in no way necessary to, or even useful, to the remainder of the farm, and it was not, therefore, appurtenant. It might have been regarded in the nature of an easement if the reservation had been made to Pierce, as owner of the farm, or on account of being the owner, but the language reserves the right to the parties of the first part, not to their heirs and assigns, nor to the owners of the farm, nor for the benefit of the farm or such owners. As the terms of the reservation indicate a personal privilege, and as there is nothing in the nature of the right reserved connecting it in any manner with the ownership or use of the remainder of the farm, there seems no alternative but to apply the established rules and recognized legal distinctions to the transaction. Ch. WALWORTH, in 22 Wend., *supra*, said: "For a *profit a prendre* in the land of another, when not

granted in favor of some *dominant* tenement, cannot be said to be an easement, but an interest or estate in the land itself."

The counsel for the appellant cited, also, from Washburn on Easements, a general rule, expressed as follows: "This right of *profit a prendre*, if enjoyed by reason of holding certain other estate, is regarded in the light of an easement appurtenant to an estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement in or out of the same."

The qualifications mentioned in these citations do not apply to the case at bar, for the reason before stated, that neither from the nature of the right, nor the terms of the grant, can it be affirmed that the right was enjoyed by reason of holding the farm, or on account of the estate. It is not like the case of a grant of land, with the right to take wood from other land for the benefit of the estate granted: Wash. on Easements, p. 8. See, also, 48 Maine, 83; 4 T. R. 717.

It may be inferred that the right reserved entered into the consideration for the conveyance of Pierce to the railroad company, but the case is destitute of any circumstance tending to establish an intention to affix the right as appurtenant to the remainder of the farm. The contiguous rights secured by the deed do not change the character of this. They are, from their nature, appurtenant to the farm, and presumptively necessary to its enjoyment. This necessarily disposes of the defendant's claim of title to the wheat, through the title to this right obtained by the deed given upon the foreclosure.

The strip of land conveyed by Pierce to the railroad company was excepted and reserved from the referee's deed, and was not intended to be conveyed; and if the words, "as conveyed," were intended as an adoption of the terms of the deed by Pierce to the railroad company, yet the defendant would take nothing by the reservation to mow and cultivate, because, as we have seen, it was a reservation in favor of Pierce and wife personally, and would terminate upon the death of either. The uncertain character of this right to mow

and cultivate, as reserved in the deed of Pierce, is significant also of an intention not to fasten it, as an enduring easement, to the remainder of the farm. The use of the strip for railroad purposes would operate to suspend or terminate the right at any time, and the railroad company would have the right at any time to determine the necessity of its use for such purposes, and hence the right is practically revocable at pleasure, and scarcely rises above the dignity of a personal license. We concur with the views expressed at Special and General Term, and it is unnecessary to elaborate them.

The judgment must be affirmed.

How acquired.

(a) By grant: *Winston v. Johnson*, 42 Minn. 398.

(b) By prescription: *Sargent v. Ballard*, 9 Pick. 251.

(c) By implication: *Holmes v. Seely*, 19 Wend. 507.

Ancient lights: *Taplin v. Jones*, 3 Eng. Ruling Cases, 1 (11 H. L. Cas. 290); *Gerber v. Grabel*, 16 Ill. 217.

*Contra*: *Morrison v. Marquardt*, 24 Ia. 35; *Pierre v. Fernald*, 26 Me. 436; *Mullen v. Stricker*, 19 Ohio St. 135; *Haverstick v. Sipe*, 33 Pa. St. 368; *Pattee's "Ill. Cases on Personality,"* 11.

Easements in streets: *Gustafson v. Hamm*, 56 Minn. 334. See further as to easements: *Soukup v. Topka*, 54 Minn. 66; *Long v. Fewer*, 53 Minn. 156.

Way of necessity: *Kimball v. R. R. Co.*, 27 N. H. 448; *Pettingill v. Porter*, 8 Allen, 1; *Kripp v. Curtis*, 71 Cal. 62 (11 Pac. 879, note); *Rogerson v. Shepherd*, 33 W. Va. 307 (10 S. E. 632).

### Lateral Support.

CHARLESS v. RANKIN.

Supreme Court of Missouri, 1856.

22 Mo. 567.

An action to recover damages occasioned by excavations made in an improper manner by defendant on his land adjoining that of the plaintiff.

LEONARD, J. The right to support from the adjoining soil may be claimed either for the land in its natural state or for

it subjected to an artificial pressure by means of building or otherwise. The right in the former case would seem to be a natural servitude or easement belonging to contiguous lots, and accordingly it was recognized and protected in the Roman law by specified regulations, and similar provisions have been introduced into the civil code of France: Code Civil, art. 614. We are not aware of any express common-law decision upon this subject; but we find it said of old, in Rolle's Abr. 564, tit. Trespass: "It seems that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit, and an action brought for such an act would lie;" and in *Wyatt v. Harman*, 3 Barn. & Adol. 874, Lord TENDERDEN remarked, in delivering the judgment of the Court of King's Bench: "It may be true that, if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs in his land, so as to occasion mine to fall in, he may be liable to an action."

When, however, the lateral pressure has been increased by the erection of buildings, it seems to be well settled at common law by authorities that no man has a right to an increased support unless he has acquired such a servitude by grant or prescription. It is so laid down in the early case of *Wilder v. Minsterly*, 2 Rolle's Abr. 564: "If A. be seised in fee of copyhold land, closely adjoining the land of B., and A. erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land, adjoining the land of B.; if B. afterward dig his land so near to the foundation of the house of A., but not in the land of A., that by it the foundation of the messuage and the messuage itself fall into the pit, still no action lies by A. against B.; inasmuch as it was the fault of A. himself, that he built his house so near the land of B.; for he cannot, by his own act, prevent B. from making the best usage of his land that he can." And Lord TENDERDEN, in delivering the judgment of the Court in the case before cited, said: "The question reduces itself to this: If a person builds to the utmost extremity of his own land, and the owner of the



adjoining land digs the ground there, so as to remove some part of the soil which formed the support of the building so erected, whether an action lies for the injury thereby occasioned. Whatever the law might be, if the damage complained of were in respect of an ancient messuage, possessed by the plaintiff, at the extremity of his own land, which circumstance of contiguity might imply the consent of the adjoining proprietor at a former time to the erection of the building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected, and if so, then, according to the authorities, the plaintiff is not entitled to recover." In the more recent case of *Partridge v. Scott*, 3 Mees. & Wels. 220, which involved the same question, it is said: "If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbor. He has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect;" and the American cases are, it is believed, to the same effect: *Thurston v. Hancock*, 12 Mass. 221.

Although not altogether in good taste, I repeat, as applicable to the present case, what I had occasion to say in a former case. It is a logical consequence from legal principles that to the extent to which a person has a right to act others are bound to suffer; and that any damage that may accrue to them, while a person thus exercises his own rights, affords no valid ground of complaint. The loss occasioned in such cases is *damnum absque injuria*. Every person, however, who is performing an act is bound to take some care in what he is doing. He cannot exercise his own indisputable rights without observing proper precaution not to cause others more damage than can be deemed fairly incident to such exercise. In *Wallars v. Pfeil*, Mood. & Malk. 364, the plaintiff had neglected to take any precaution by shoring up their own houses within, or in any other way against the effect of pulling down the defendant's adjoining house; and it appeared

that this might have been so done that the accident would not have happened to the same extent. There was also evidence to show that the accident was owing to the bad foundation of the plaintiff's house; but there was conflicting evidence as to whether, by due care on the part of the defendant's workmen, the mischief might have been entirely avoided. In summing up, the Chief Justice of the Queen's Bench stated it to be now settled that the owner of premises adjoining those pulled down must shore up his own in the inside, and do everything proper to be done upon them for their preservation; but, although that had not been done, still the omission did not necessarily defeat the action, and that if the pulling down were irregularly and improperly done, and an injury were produced thereby, the person so acting would be liable, notwithstanding the omission of the plaintiff; and the jury were accordingly charged, that, if the defendant's house was pulled down in a wasteful, negligent, and improvident manner, so as to occasion greater risk to the plaintiff than in the ordinary course of doing the work he would have incurred, then the defendant was liable to make compensation for the consequences of his want of caution; but that if they thought fair and proper caution had been exercised, then the defendant would be entitled to a verdict. The result of the cases, we think, is (and such would seem to be the reasonable doctrine) that if a man in the exercise of his own rights of property do damage to his neighbor he is liable, if it might have been avoided by the use of reasonable care; and it seems to be usual in England for a party intending to make alterations that may affect his neighbor's premises to give notice of his intention; but whether any such duty be imposed by law (*Town v. Chadwick*, 8 Scott, 1) need not be inquired into here, as the present plaintiff knew of the digging and took measures to protect himself against the consequences of it.

These principles require us, we think, to reverse the judgment, and send the case back for a second trial. We do not think there is any error in the refusal of the defendant's first and fourth instructions. A party may subject himself to

responsibility by the want of reasonable care, although his digging be confined to his own ground and do not exceed a reasonable depth ; nor is he protected by the fact that he used such care as his builder, who was a skillful and careful person, deemed necessary. The question is, as to the fact of negligence, whether the work were done in a careless and improvident manner, so as to occasion greater risk to the plaintiff than in the reasonable course of doing the work he would have incurred, and not whether, in the opinion of the superintendent, no matter how skillful he may have been, everything was done that he deemed necessary. His opinion may be proper evidence to be considered by the jury, but it does not conclude the matter, constituting of itself a bar to the plaintiff's recovery. But the error is in plaintiff's third instruction, where an attempt is made to define, with precision, the degree of care that must be used in a case like the present, in order to exempt a party from liability ; and the standard there adopted is substantially that care that a prudent man, experienced in such work, would have exercised if he had been himself the owner of the injured building. Now it is quite evident, we think, that this is going beyond the care that the law exacts upon such occasions. It is to be observed that the defendant was upon his own ground, and in digging upon it exercised an undoubted right of property, which the plaintiff had no right, either by express grant or prescription—by statute or local ordinance—in any way to interfere with or prevent ; and although, in exercising his rights, it was certainly his duty to his neighbor to use ordinary care in order to avoid doing him harm, he was not bound to observe the same care that he would have taken, as a wise and sensible man, if he had been the owner of both buildings—the one erected and the one about to be erected. He would, of course, in that event have shored up and would have submitted to many inconveniences, and, indeed, would have incurred considerable additional expense in doing the new work rather than expose the building already erected to any risk. Every prudent person, in such a situation, would take precautions—subject himself to incon-

veniences and forego the exercise of every right that would endanger his present building if he found it for his interest to do so. In the present case, if the laying of the new foundation, in very short sections, would have been attended with increased expense and with danger to the sufficiency of the new wall, and the defendant had been the owner of the plaintiff's building, he might have found it for his interest to have submitted, and most probably would have submitted, to this inconvenience and risk, and even increased expense, to avoid all hazard to his own property; yet the law does not exact of him the same forbearance and care and expense for the security of his neighbor's property that he would have found it for his interest to have taken for his own. We do not know that the instruction was intended, or indeed understood, by the jury in the sense we impute to it. It may, however, have been so understood, and if so, could not but have misled them; and we shall therefore reverse the judgment, that the case may be retried upon a fuller understanding of the facts and of the law applicable to them.

The judgment is reversed and the cause remanded.

Austin *v.* Hud. R. R. Co., 25 N. Y. 334; Richardson *v.* Vt. Cent. R. R., 25 Vt. 465; Beard *v.* Murphy, 37 Vt. 101; McGuire *v.* Grant, 25 N. J. L. 356.

Party-wall. Each of two owners of a party-wall has title in severalty to one-half thereof and an *easement* for the support of the other half: Warner *v.* Rogers, 23 Minn. 34; Brooks *v.* Curtis, 50 N. Y. 639; Dowling *v.* Hemmings, 20 Md. 179; Fraute *v.* White, 19 Atl. 196.

## II

### FRANCHISES.

A franchise is a special privilege conferred by the government upon persons either natural or artificial. (a) Ferry.

LIPPENCOTT *v.* ALLANDER *et al.*

Superior Court of Iowa, 1869.

27 Ia. 460.

The plaintiff applied to the board of supervisors to vacate a ferry license on the ground, among other things, that Kerr, to whom it was granted, was dead.

BECK, J. But one question is presented by the record for our determination; it is this: Is a ferry license vacated or the franchise lost by the death of the party to whom it was granted?

The right acquired under a ferry license is called a franchise, and is conferred by grant from the government, and with an implied covenant, on the part of the government, not to invade the right vested, and, on the part of the grantee, to perform the duties and conditions prescribed by the grant: 3 Kent's Com. 458. This franchise is included in the general denomination of incorporeal hereditaments, a term used to distinguish one of the different kinds of things real. It partakes of a double nature and character. So far as it affects or concerns the public it is *publici juris*, and is subject to governmental control. The Legislature may prescribe the manner of granting it, to whom it may be granted, the conditions and terms upon which it may be held, and the duty of the grantee to the public in exercising it, and also provide for its forfeiture upon the failure of the grantee to perform that duty. But when granted it becomes the property of the grantee and is a private right subject only to the governmental control growing

out of its other nature of *publici juris*: *Benson v. Mayor of New York*, 10 Barb. (S. C.) 223. In this character and nature it is essentially in all respects property, and is governed by the same rules as to its enjoyment and protection, and regarded by the law, precisely, as other property: *Conway v. Taylor's Ex'r*, 1 Black. 632; *Bowman's Devisee v. Wathan*, 2 McLean, 376; *Dundy v. Chambers*, 23 Ill. 370; 3 Kent's Com. 458.

The fact that it is conferred by grant from the government, and may be forfeited by mis-user or non-user, does not argue that it is not property, or that it may be lost in a way or manner which will not deprive the owner of other property of his rights therein.

Under the provisions of our statute, ferry licenses are granted by the board of supervisors of the county for a limited time, and to such persons as, in the opinion of the board, will best serve the public interest, preference being given to the owner of the land or of a previous ferry. Conditions and terms may be imposed by the board as prescribed by the statute, and for the violation thereof the license may be revoked. No restriction is imposed upon the sale or transfer of the franchise, and there is no provision that, upon the death of the party to whom the license was issued, it shall be vacated and the franchise lost.

It may be sold upon execution as real property, except that the purchaser may take immediate possession of all property ordinarily used in the exercise of the franchise, which, it is provided, is transferred by the sale. The purchaser at once enters upon the exercise of the franchise. It is exposed to sale differently from other property; he who will take the franchise for the shortest time, within the period for which the license was issued, in satisfaction of the execution, shall be considered the highest bidder: Rev., chap. 54. Nothing is found in this chapter or in other statutes taking from this franchise the character of property possessed by all other things over which men exercise dominion and ownership. The peculiar provision regulating the manner of its sale upon execution is designed to secure the continuance of the ferry for

the public convenience, notwithstanding the transfer of the franchise thereby. No argument can be drawn from this provision in support of the decision of the Court below.

It is argued that the grant of the franchise is made in view of the fitness and qualifications of the grantee and involves a personal trust which cannot be assumed and exercised in case of his death by his representatives, because they may be unfit and unqualified therefor. Hence it is thought the death of the grantee terminates the franchise. The answer to this is that, if the person exercising the franchise fails to perform the duties appertaining thereto, the license, by proper proceedings, may be revoked: Rev., § 1212. And that this position of appellee is not in accordance with the policy of our statutes is made very plain, by the provisions permitting and regulating the sales of the franchise upon execution. In such case the purchaser, by substitution, assumes the duties of the original grantee, and acquires all his rights. No reason can be given why the law will permit this, and yet prohibit the exercise of the franchise, in case of the death of the grantee, by his representatives. The doctrine contended for leads to another inconsistency, namely: the franchise may be subjected to the payment of the debts of the grantee in his lifetime, but is not assets for the payment of the same debts after his death.

The grant of a ferry franchise is made for a specified time, not less than three nor more than ten years, with no reservation that it shall terminate upon the death of the grantee. Being, as we have seen, property it would not, upon every analogy of the law, be lost by the death of the grantee. At common law it was granted as other real property in estates for years, for life, or in perpetuity, and was so held. Under our statute it is granted in an estate for years only, and the death of the grantee can no more terminate it than the death of a tenant can terminate a like estate in lands.

The above hardship and injustice of the rule contended for support a powerful argument against it. These franchises often require great outlays for boats, improvement of roads, etc., in order to render them remunerative to the owners and

useful to the public. The property thus acquired is valuable only in connection with the franchises, and if they are forfeited by the death of the grantees, great loss and gross injustice would thus be wrought their estates.

The doctrine contended for by defendant's counsel is not supported by the authorities they cite, viz., *Munroe v. Thomas*, 5 Cal. 470, and *Thomas v. Armstrong*, 7 Ib. 286. These cases hold that ferry franchises are not the subjects of levy and sale under execution. The decisions appear to be based upon the grounds that a ferry franchise "involves a personal trust granted by the sovereign, upon conditions imposed upon the grantee alone, and his liability cannot be removed by substitution." Such sales, as we have seen, are recognized by our statutes, and the ground of these decisions seem to be unsupported by reason and principles of law. The other authority cited (*Bowman v. Wathin*, 1 Howard, 189) does not appear applicable to the question involved in this case.

Reversed.

Franchise defined : *Bank v. Earle*, 13 Peters, 519.

Bridges : *Chenango Br. v. Paige*, 83 N. Y. 178.

Turnpike : *Turnpike Co. v. The State*, 3 Wall. 210.

Railroads : *C. C. Ry. Co. v. The People*, 73 Ill. 541.

Insurance Co. : *People v. Utica Ins. Co.*, 15 Johns. 358-87.

Gas Companies : *Brunswick Gaslight Co. v. United Gas, Fuel and Light Co.*, 85 Me. 532 (27 Atl. 525).

A franchise is not necessarily incident or appendant to any estate in land : *Day et al. v. Stetson*, 8 Me. 368. See further as to franchises : *Hudson v. Cuero L. & E. Co.*, 47 Tex. 56 ; *McRoberts v. Washburne*, 10 Minn. 28 ; *Rockport Water Co. v. Inhabitants of R.*, 161 Mass. 279.



### III

#### RENT.

"Rent is a right to the periodical receipt of money or money's worth in respect to lands which are held in possession, reversion, or remainder by him from whom the payment is due:" 2 Wash. R. P. 284.

VAN RENSSELAER *v.* READ.

Court of Appeals of New York, 1863.

26 N. Y. 558.

Van Rensselaer conveyed to Read land in fee, reserving a perpetual annual rent of  $17\frac{1}{4}$  bushels of wheat, among other things, and dying testate the question arises whether under his will such rents pass to a devisee under a clause relative to *hereditaments*.

SELDEN, J. A brief statement of the principles which appear to be definitely settled, touching the rights and liabilities of parties under instruments of the nature of that which forms the foundation of the present action, by enabling us to see distinctly what remains undetermined, will be of service in the examination of the questions now presented for decision. The following may be regarded as principles thus settled:

1. That, since the passing of the Act of 1787, "concerning tenures" (however it may have been before that time), it has not been possible to create any new tenures in this State upon conveyances in fee. Such conveyances operate as assignments and not as leases, whatever name may be given to them, and leave neither any reversion, nor possibility of reverter, in the grantor: *De Peyster v. Michael*, 6 N. Y. 467; *Van Rensselaer v. Hays*, 19 Ib. 68.

2. That an annual rent, issuing out of the lands, reserved in such conveyance, to the grantor, his heirs and assigns forever, with a covenant on the part of the grantee for its payment, together with a right of distress and re-entry in case of non-payment, although not a rent-service, for want of a reversion in the grantor, is a fee farm rent, or, if not strictly such (*Bradby on Distress*, 34; *Harg.*, n. 5, on *Co. Litt.*, 143, b; 19 N. Y. 76), it is a rent-charge in fee, and equivalent to such rent-charge granted by the owner of lands in fee: *Litt.*,

§ 217; Co. Litt., 143, b; Gilbert on Rents, 16, 17, 39; 2 John. Cas. 26; 2 Cow. 659; 13 N. Y. 369; Ib. 77, 78, 100.

3. That such rent is a hereditament and descends, in the absence of other disposition, to the heirs of the party to whom it is reserved, and is devisable and assignable in all respects like other incorporeal hereditaments: 2 Sand. on Uses and Trusts, 32, 5th ed., Lond., 1844; Shep. Touch. 238; Lade v. Baker, 2 Vent. 149, 260-266; Maund's Case, 7 Co. 286; 2 Johns. Cas. 17; Ib. 24; 12 N. Y. 132; 19 Ib. 68, 100.

4. The right to distrain, and the right to maintain actions of annuity, and assize of novel disseisin, at common law, followed the ownership of the rent, when it passed from the person to whom it was reserved, whether it passed by descent or assignment: *Vechte v. Brownell*, 8 Paige, 212; *Bradby on Dist.* 51, 52; *Adams on Distresses*, 36; *Maund's Case*, 7 Co. 28, b; Co. Litt. 144, b, and Harg., note 1; *Roscoe on Real Actions*, 65; *Gilbert on Rents*, 83-100; Litt., §§ 233-235. Attornment by the tenant was necessary to entitle the assignee to distrain or to maintain annuity, and actual seisin of the rent by payment of a part, to authorize an action of assize; but that necessity, at least so far as related to attornment, was removed in England by the Statute 4 Anne, ch. 16, § 9, which was early re-enacted in substance, and has since been kept in force in this State: 2 Sand. on Uses and Trusts, 40-46; *Butler's Note*, 272, to Co. Litt., lib. 3, 309 b; *Gilbert on Rents*, 32, 33-51, 52; *Doug.* 624; *Strange*, 108; *Yelv.* 135; 2 *Greenl. Stat.* 115; 1 R. L., p. 525, § 25; 1 R. S., p. 739, § 146.

5. That the covenants entered into by the grantee of the lands, in behalf of himself, his heirs and assigns, are covenants real which run with the land, and are binding upon the heirs and assigns of the covenantor, successively as to all breaches of such covenants which occur during their respective ownership of the lands: *Van Rensselaer v. Hays*, 19 N. Y. 68; *Platt on Covenants*, 493, 494.

6. That a devise or assignment of the rent gives to the devisee or assignee at least the equitable interest in the rent, and the right to equitable remedies for its recovery, without any aid from the Act of 1805, partially repealed by the Act: Ch. 396, Laws of 1860; 19 N. Y. 85, 86.

7. That the personal representatives of the original grantor, to whom the rent was reserved, can maintain no action on the covenant for the payment of rent, on account of any default in payment occurring after the death of such grantor: *The Executors of Van Rensselaer v. The Executors of Platner*, 2 Johns. Cas. 17.

8. That a devisee or assignee of the rent can maintain no action against the personal representatives of the original covenantor, on account of any default in payment of rent, occurring after the death of such covenantor: *The Devisees of Van Rensselaer v. The Executors of Platner*, 2 Johns. Cas. 24.

9. The terms of the devise to the plaintiff are sufficient to vest in him the right to the rent in question.

Several cases have been decided by this Court in which the right of the present plaintiff, under the devise in question, to rents of the character of those here claimed, has been sustained, and although the subject of the sufficiency of the devise to vest the title to the rents in the devisee does not appear to have been specially noticed by the Court, it is hardly possible that it could have passed unobserved, and the decisions in those cases, if not conclusive, raise a strong presumption in the plaintiff's favor upon this point: *Van Rensselaer v. Snyder*, 13 N. Y. 299; *The Same v. Hays*, 19 Ib. 68; *The Same v. Ball*, Ib. 100. But regarding the question an open one, I entertain no doubt that the language of the devise is broad enough to embrace the rents. In the case of *Hunter v. Hunter*, 17 Barb. 28-86, such rents were held to pass by the words, "all my lands, in the county of Greene." Whether perpetual rent charges are properly denominated lands or not, they certainly come within the terms "lands, tenements, and hereditaments," used in the present devise. Lord COKE says (Co. Litt., 6 a): "Tenement is a large word to pass not only lands and other inheritances, which are holden, but also offices, *rents*, commons, profits apprender out of lands, and the like, wherein a man hath any frank tenement, and whereof he is seised *ut de libero tenemento*. But hereditament is the largest word of all in that kind, for whatsoever may be inherited is an hereditament, be it corporeal, incorporeal, real, personal, or mixed:" 2 Rolle's Ab. 57; *Rich v. Sanders, Styles*, 261-278. That rent charges in per-

petuity are hereditaments has never been questioned : 2 Johns. Cas. 21, 26 ; *Jemmot v. Cooly*, 1 Lev. 170 ; s. c., 1 Saund. 112.

From the foregoing statement it will be seen that the reservation of the rent in question is valid ; that the covenant for its payment is a covenant real, running with the land, binding the defendant personally for its payment (his ownership of the lands, when it accrued, being undisputed), and that the plaintiff, by virtue of the devise from his father, was the owner of the rent when it became due, having, at common law, the right to distrain for it or to maintain an action of annuity for its collection. The further question is now presented, whether the devisee or assignee of the rent may, either at common law or by virtue of any statute now in force, maintain an action on the covenant for the rent against the grantee or assignee of the covenantor.

The burden of the covenant, as we have seen, runs with the land against the person who is, in equity, bound to pay the rent. Does the benefit of such covenant run with the rent in favor of the person who is in equity entitled to receive it? If the assignee of the rent cannot avail himself of the covenant for its payment, one object of the parties to the covenant will fail. They covenanted for acts to be performed by and to each other's heirs and assigns annually forever, in regard to this land. These acts were designed to be performed directly between such heirs and assigns without the necessity of maintaining the expensive and cumbrous machinery of perpetual personal representatives of the parties. The decisions which have been referred to show that, on the part of the person bound to pay the rent, no such machinery is necessary ; that the law deals directly with him, as holding the land charged with the rent, and, therefore, in law as well as in equity, bound to pay it ; that the legal and the equitable duties accompanying each other, both follow the title to the land, into whatever hands it may go, the assignee taking the place of the covenantor, and being bound by his covenants, so long as he remains such assignee, and no longer : *Platt on Cov.* 494. The same decisions show, also, that on the other side the equitable right to receive the rent passes to the assignee in the same manner as the equitable obligation to pay it follows the title to the land. It is claimed, on the part of the defendant, that the legal right of

action on the covenant does not pass with the rent to the assignee, but is either extinguished by the assignment, or remains in the original covenantee, or his personal representatives.

The case of Hays, above cited, shows that the covenant is not extinguished by the assignment; and no adequate reason can be given for denying to the assignee of the rent the right to maintain an action upon it. The only reason which has been assigned in the authorities to which we have been referred for such denial, is that upon which the common law prohibited the assignment of all choses in action—the prevention of maintenance. But the covenant for the payment of rent is not within this rule. It is not a covenant in gross or a mere chose in action (*Stevenson v. Lombard*, 2 East. 576), but is a part of the security for the payment of the rent. The rent itself being assignable, the covenant for its payment should, it would seem, be assignable to the same extent, for the reason given by Chief Baron GILBERT, why a *nomine poenæ*, when provided for in the lease, passes to the assignee of the rent, viz., “because whosoever has a right to the rent ought to have all that security for the payment of it which was taken on the original creation of it:” *Gilbert on Rents*, 143; *Cro. Eliz.* 895; 7 *Peters*, 605, 606. Rent due is a mere chose in action and not assignable, but it is otherwise of rent not due: *Bradby on Distresses*, 52; *Adams on Distresses*, 36. The covenant for its payment should, therefore, be assignable before breach, but not after. It was so held in *Demarest v. Willard*, 8 *Cow.* 211; *T. Ray.* 200.

Even if the law was clearly settled in England, that such covenants were not assignable, I should be unwilling to follow that rule, unless it had been already recognized by our own Courts, especially since we have abrogated the doctrine of maintenance, upon which alone it rested. It is, however, far from being settled in England, and no precedents in its support in this State have been brought to the notice of the Court; on the contrary, there are several decisions leading to the opposite conclusion.

In the case of Hays, the right of the assignee to maintain an action on the covenant for the payment of rent in a lease or indenture, like the present, was sustained, but the decision was placed upon the effect of the Act of 1805, which was held to extend to the assignees of rents reserved in conveyances in fee, the

same remedies by action for the non-performance of covenants, against the grantees and their assigns, which were secured to the assignees of reversions, by chapter 7 of the Laws of 1788.

Since that case was decided, and prior to the commencement of the present action, the Legislature, by chapter 396 of the Laws of 1860, has declared that the Act of 1805 and its re-enactments shall not apply to deeds of conveyance in fee made before the 9th day of April, 1805. The plaintiff's cause of action was complete under the Act of 1805, prior to the passing of the Act of 1860, and the constitutionality of the latter Act, as applied to the present action, is therefore denied. The Act of 1805 has been held to affect the remedy only, and not the contract, and for that reason not liable to this objection, when urged by the assignee of the covenantor: 19 N. Y. 68. The objection to its repeal would, nevertheless, be effectual in favor of the plaintiff if such repeal would deprive him of all substantial remedy for the recovery of the rent, but not otherwise. As I am satisfied that his remedy was not affected by the repeal, this question becomes immaterial.

It is insisted on the part of the plaintiff that the Act of 1788, as re-enacted in the Revised Statutes (Vol. 1, p. 747, §§ 23, 24), without the declaratory Act of 1805 (Ib., § 25), is broad enough to embrace the present case, and to give the assignee of the rent a right of action on the covenant for its payment. I think the Act in its present form might fairly receive that construction; but its title as originally passed, viz., "An Act to enable *grantees of reversions* to take advantage of the conditions to be performed by lessees," would create a doubt whether the general expressions contained in the Act were not intended to be limited to grantees or assignees of reversions, though such limitation is not expressed. So far as the statute has received the attention of Judges, the opinion appears to have been entertained that its benefits were confined to parties having the reversion of the lands to which the conditions or covenants related, and such is the established construction of the Statute 32 Henry VIII, chapter 34, after which our statute was modeled. The solution of the present question, therefore, must depend upon the common law or upon recent statutes relating to the prosecution of actions.

The first ground upon which the judgment in this case is sought to be sustained without the aid of the Acts of 1788 and 1805 is, that the covenant for the payment of the rent is not a merely personal covenant, but a covenant real, the benefit of which passed to the plaintiff on the devise of the rent to him. This question has been much discussed by Judges and elementary writers, and cannot be regarded as entirely at rest on either side of the Atlantic. I shall not attempt to review the cases, as very little could be added to what appears in the English and American notes to *Spencer's Case*, 1 *Smith's Lead. Cas.* 22, and in the recent treatise of Mr. Sugden on Vendors and Purchasers.

Mr. Sugden says (Vol. 2, p. 482): "The rent charge is an incorporeal hereditament, and issues out of the land, and the land is bound by it; the covenant, therefore, may well run with the rent in the hands of an assignee; the nature of the subject, which savors of the realty, altogether distinguishes the case from a matter merely personal." Again, at page 492, after reviewing the English cases bearing upon the question, he says: "Upon the whole it is submitted that covenants, like those in *Brewster v. Kidgell*" [which was a case of a rent charge in fee with a covenant for its payment, free from taxes], "ought to be held to run in both directions; with the rent or interest carved out of or charged upon it" [the land], "in the hands of the assignee, so as to enable him to sue upon them; with the land itself in the hands of the assignee, so as to render him liable to be sued upon it." This conclusion is confirmed by the decision of the Supreme Court of the United States, in the case of *Scott v. Lunt's Administrators*, 7 *Pet.* 596, in which the assignee of a rent charge in fee, created by an indenture in all material respects similar to that under which the plaintiff claims, was held entitled to maintain an action of covenant for the rent, against the administrator of the covenantor.

The difference of opinion on this question among Judges and elementary writers has, I think, mainly arisen from a misunderstanding by some of them of the remarks of Lord *HOLT*, in the case of *Brewster v. Kidgell*, as was shown in the opinion of Judge *DENIO*, in the case of *Van Rensselaer v.*

Hays, *supra*. In that opinion the learned Judge, after referring to the passages above quoted, from the treatise of Mr. Sugden, says: "The great learning of the author, afterward as Lord ST. LEONARDS, Lord Chancellor of England, would incline me to adopt his conclusion, were it not that we have a precedent the other way in this State," referring to the case of *The Devises of Van Rensselaer v. The Executors of Platner*, 2 Johns. Cas. 26. I do not understand the decision in that case as in conflict with the opinion of Mr. Sugden; on the contrary, when considered in connection with the case of *The Executors of Van Rensselaer v. The Executors of Platner*, decided at the same term, it appears to me very strongly to confirm that opinion. Both these actions were brought to enforce covenants for the payment of rent, entered into by Platner, the defendant's testator, in an indenture executed in 1774, by which John Van Rensselaer conveyed to him in fee simple, reserving rent with rights of distress and re-entry, and with covenants for payment on the part of the grantee, in all respects similar to those contained in the indenture, on which the plaintiff relies in the present action. In the case in which the Executors of Van Rensselaer were plaintiffs, they had claimed in their declaration several years' rent, which accrued during the life of their testator, and for one year's rent, which became due after his death, and had obtained a verdict for the whole. All the rent had accrued after the death of Platner, the original covenantor. A motion was made in arrest of judgment, and two grounds were relied upon in support of the motion. *First*, that the executors of Platner were not liable for rent which accrued subsequent to the death of their testator. *Second*, that the executors of Van Rensselaer could not recover for rent which accrued subsequent to the death of their testator. It was held that the executors of Platner were liable on the express covenant of their testator, notwithstanding the descent of the land to his heirs, and that the recovery, so far as it embraced rent which became due during the life of the plaintiff's testator, was correct; but that the plaintiffs had no right of action for the year's rent which became due after the death of their testator, and for that reason judgment was arrested. KENT, J., said: "It is clear



that the executor can only go for rent due and payable at his testator's death, *where the rent, as in the present case, goes on the testator's death to his heirs.*" In the other case, parties to whom John Van Rensselaer had devised the rent were plaintiffs, and had obtained a verdict against the executor of Platner for rents which became due subsequent to the death of both Platner and Van Rensselaer. The judgment was arrested, not on the ground that the devisees were not entitled to maintain an action on the covenant, but on the ground that the defendants were not liable to the plaintiffs as devisees for the rent, "which," as the Court says, "is created by reason of the contract, and is by reason of the profits of the land, wherein none is longer chargeable with them than the privity of estate continues with them." It was held that the executors of the covenantor were liable only by force of the personal contract of their testator, without reference to the land, and in that respect were liable only to those "legally competent to represent the *mere personal rights*" of the covenantee, which the plaintiffs clearly were not. Chief Justice LANSING, who delivered the opinion of the Court, said: "This rent is a fee farm rent (Harg. Co. Litt., 145, b. n. 5) or rent charge; it is perpetual. The rent is real estate, and so, certainly, is the estate out of which it issues; the rent and the land granted are equally transmissible to the heirs of the person seised. . . . If the *covenant descends with the land, it must equally descend with the rent issuing out of the land*; and if so, the personal representatives cannot, after the death of the parties and for rents accruing after the death of both, *either maintain or be subject to an action.* On the privity of contract, the defendants cannot be liable to the plaintiffs, because they are not legally competent to represent the mere personal rights of the testator arising from the contract. They cannot otherwise represent him than as the rights of the testator devolve upon them; but those being merely taken as devises, they are strictly confined to the real estate. If they claim against the defendants, deducing their title by the devise, they must claim on the principle that the common ligament, *the estate charged*, unites them in interest, as privies, with the defendants; but it is not pretended that the executors hold the estate, or have any

interest in it, and on this ground the action is not attempted to be sustained." All which this case decides, therefore, is that the executors of a person who covenants to pay a perpetual rent charge are not liable on the covenant to any person except the covenantee and his personal representatives; and, in connection with the previous case, which decides that such personal representatives cannot recover for rent falling due after the death of their testator or intestate, for the reason that the rents go to the heir or devisee, it shows that the executor of the covenantor can never be made liable for any default which does not occur during the life of one of the original parties to the covenant. Possibly this limitation of the liability of covenantors may not be consistent with the common law rule as recognized in England (Platt on Cov., 194, 195; *Ib.* 493; 7 Pet. 604); but it is in substantial accordance with the manifest intention of the parties, as expressed in the contract, and is strongly recommended by its justice and convenience. These cases having been decided by a Court of great learning and ability more than fifty years since, and the correctness of the decisions, so far as I am informed, never having been questioned, I cannot do otherwise than to recognize them as expressing the proper limitation of the liability of parties on covenants for the payment of perpetual rents.

\* \* \* \* \*

In my opinion, however, the right of the plaintiff to recover in this case is entirely clear, upon the ground that the covenants at common law run, as was said by Mr. Sugden, with the rent, in the hands of the assignee, so as to enable him to sue upon them, and with the land itself in the hands of the assignee, so as to render him liable to be sued upon them; and that for that reason the judgment should be affirmed.

Judgment affirmed.

*Van Rensselaer v. Hays*, 19 N. Y. 68; *Wallace v. Harmstad*, 44 Pa. St. 492; *Minneapolis Mill Co. v. Tiffany*, 22 Minn. 463.

# ILLUSTRATIVE CASES

IN

## REALTY.

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### ESTATES IN LAND.

An estate in land is the *quantum* of interest which a person may hold therein.

#### I

### FREEHOLD ESTATES.

A freehold estate is an estate of inheritance, or for life, in land, and at common law could be created only by livery of *seisin*.

CUTTS *v.* COMMONWEALTH,  
Supreme Judicial Court of Massachusetts, 1807.  
2 Mass. 284.

SEDGWICK, J. This case is brought before the Court by a writ of error, which complains of a judgment of the Court founded on a suit in favor of the Commonwealth against the plaintiff in error, instituted by the solicitor-general, by the order of a special resolve of the Legislature, in pursuance of the Act passed June 18, 1791, "directing the manner in which inquests of office shall be taken to revest real estate in the Commonwealth, or to entitle the Commonwealth thereto."

This writ is grounded on the second section of the statute,

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which enacts "that in all other cases, where an inquest of office is necessary by law to entitle the Commonwealth to hold lands, tenements, or hereditaments, such inquest shall be taken by the Supreme Judicial Court, in the county where such estate lies, upon information of the attorney-general describing" (among other things) "the estate claimed, and the title set up thereto, by the Commonwealth."

As this is a prosecution instituted by statute, in which, from the nature of the subject, the government, the party plaintiff, is the whole people, against an individual or individuals, the party defendant; and against whom the Judges are inevitably interested, it becomes important that none of the guards, which the law has provided for the security of the defendant, should be dispensed with. The statute, as recited, has rendered it necessary that the information should describe, 1st, *The estate claimed* by the Commonwealth, and 2d, *The title set up thereto* by the Commonwealth. If the information on which the judgment was founded was deficient in describing *the estate claimed* by the Commonwealth, or *its title thereto*, the judgment must be reversed; then—

1. Does the information describe the *estate* which the Commonwealth claims in the demanded premises? By "estate" in land, I understand, the kind and *quantum* of interest therein. This interest may be a freehold, or of an inferior degree. A freehold may be of inheritance or for life. If of inheritance, it may be pure or base, absolute or conditional, in fee simple or fee tail. If fee tail it may be general or special. If for life it may be for that of the tenant or of another person, with or without impeachment of waste, absolute or conditional. If the estate be less than freehold, the term may be of greater or less duration, and with duties to the superior, more or less burthensome. In short, an *estate*, in real property, is susceptible of every possible variation in which man can be related to the soil. When the government claims, against an individual, lands in his possession, it is proper that the law should provide, as this Act does, that the "estate claimed," *the kind and quantum of interest* therein, should be described. Indeed this

is necessary, ordinarily, in controversies between private persons. Was this done by the information in this case? I think not. After describing the land to which claim is laid, the information says, "which tract of land the Commonwealth are entitled to hold and possess." Here, certainly, the *estate* claimed by the Commonwealth is not described. Nothing could have been less precise and more indefinite than the words "hold and possess" as descriptive of an estate in lands; they apply equally to many kinds of estates. The information gives no other description of *the estate* of the Commonwealth in the lands demanded than by describing *that* derived from Sir William Pepperell. And there is no other *estate* intended to be described as derived from him but what is expressed by the allegation that he "was seized and possessed, and entitled to be seized and possessed of the tract of land" demanded. Here again the words, descriptive of the estate of Sir William are altogether vague and indefinite. The information then does not "describe" the *estate*, the kind and *quantum* of interest claimed in the land demanded.

2. The remaining question is, whether the *title set up*, by the information, to the lands demanded, is such as would authorize a judgment for the possession, in favor of the Commonwealth? The title set up is an Act of the government, passed on the 30th of April, 1779, "to confiscate the estates of certain notorious conspirators," etc. In this Act, among others, Sir William Pepperell is named, and it enacts "that all the goods and chattels, rights and credits, lands, tenements, and hereditaments of every kind, of which any of the persons before named were seized or possessed, or entitled to possess, hold, enjoy, or demand, in their own right, or of which any other person stood, or doth stand seized or possessed, or are or were entitled to have or demand to and for their use, benefit, and behoof, shall escheat, inure, and accrue to the sole use and benefit of the government and people of this State, and are accordingly declared so to escheat, inure, and accrue; and the said government and people shall be taken, deemed, and adjudged, and are hereby accordingly declared to be in the real and actual

possession of the goods, etc., lands, etc., without further inquiry," etc. To this there is a proviso, in these words: "*Provided always*, that the escheat shall not be construed to extend to, or operate upon any goods, chattels, rights, credits, lands, tenements, or hereditaments, of which the persons aforementioned and described, or some other in their right and to their use, have not been seized or possessed, or entitled to be seized or possessed, or to have or demand, as aforesaid, *since* the 19th day of April, in the year of our Lord 1775."

From this recital it is manifest that to derive a title to any lands, from the seisin or possession of a conspirator, named in the Act, to the Commonwealth, it was necessary, 1st, that the person from whom the title was derived should have been seized or possessed, *in his own right*; and 2d, that such seisin or possession should have been since the 19th day of April, 1775, and before or at the time of passing the Act. The Act, however just or necessary, was certainly rigorous, and must therefore have a strict construction. Now the information does indeed say that Sir William Pepperell was seized and possessed of the land described, but it does not aver that it was *in his own right*. He might have been seized and possessed, in trust or in the right of another, of the land demanded, and yet no title derived, by the Act, to the Commonwealth. Again, to derive a title from Sir William to the Commonwealth, he must have been seized *since* the 19th day of April, 1775, and before the 30th day of April, 1779. But the allegation in the information is that *prior* to the 19th day of April, 1775, and *since that time*, he was seized and possessed. All this might be true, and yet the lands demanded not be confiscated by the Act. This allegation may be all true, and yet the whole time within which the Act required a seisin and possession, to give effect to the confiscation, excluded. The title *set up*, therefore, is wholly defective, and cannot be aided by the verdict.

I have not incumbered my opinion with a recital of the errors assigned by the plaintiff, because it was found to be unnecessary, from the view taken of the case by the Court. We

are all of opinion, for the reasons which I have stated, that the judgment must be reversed.

WILLIAMS, R. P. 22; 2 Bl. Comm. 104; Van Rensselaer *v.* Poucher, 5 Denio, 35; Jackson *v.* Parker, 9 Cowen, 73; Moody *v.* Farr's Lessee, 33 Miss. 192; Bridgewater *v.* Bolton, 6 Mod. 106 (note); Gage *v.* Scales, 100 Ill. 218; Wyatt *v.* Irrigation Co., 18 Col. 298.

## A

### FREEHOLD ESTATES OF INHERITANCE.

#### 1

#### A FEE-SIMPLE ESTATE.

**An estate in fee simple is a freehold estate of inheritance without condition or limitation, and of indefinite duration.**

JACKSON *v.* VAN ZANDT,

Supreme Court of Judicature, New York, 1815.

12 Johnson, 169.

*fine.*

THOMPSON, C. J., delivered the opinion of the Court (SPENCER, J., dissenting). The grounds upon which the plaintiff's counsel rested their argument, to show that the Act of 1782 did not reach their case, were,

1st. That the Act did not operate prospectively.

2d. That it did not give to the tenant in tail, a fee simple absolute, but only operated as a repeal to the statute *de donis*, leaving the estate a conditional fee, as at common law.

With respect to the first objection: it is true, that the Act is not drawn with skill and accuracy; and, according to strict grammatical construction, may be liable to the criticism made by the plaintiff's counsel. But the sense and meaning of the Act, and the intention of the Legislature, cannot be mistaken.

„ It is a well-established principle in the exposition of statutes that every part is to be considered, and the intention of the

Legislature to be extracted from the whole; and when great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the Legislature be plain: 2 Cranch, 386.

It is a first principle in legislation, that all laws are to operate prospectively. And it appears to me that it would be doing great violence to the intention of the Legislature, to limit this Act to estates tail then existing. This would be comparatively doing nothing. It would be obviously against the general scope and object of the statute, which was to abolish entails. It is a settled rule of construction, that when the words of a statute are obscure or doubtful, the intention of the Legislature is to be resorted to in order to find out the meaning of the words. This intention is sometimes to be collected from the cause or necessity of making the statute. And whenever the intention can be discovered, it ought to be followed, with reason and discretion, in the construction although it seems contrary to the letter of the statute: 6 Bac. Ab. 384. If this be a sound rule of interpretation, and of which there can be no doubt, it must apply with great force to the case before us. And, indeed, the intention of the Legislature is so obvious, that it was not pretended to be denied by the plaintiff's counsel in the argument. The Act of 1787, by which the premises in question are given to Richard Penn Hicks, is a strong legislative construction of the Act of 1782. For it was obviously made for the express purpose of carrying into effect the will of Thomas Hicks, according to the intention of the testator. It alleges, by way of recital, that, were it not for the late Acts abolishing entails, Richard Penn Hicks would have become seized in fee tail general of the premises in question. But by such law the estate in fee tail general, devised to Mary Hicks was converted into a fee simple, and she, having been born out of lawful wedlock, could have no heirs, by means whereof the lands escheated to the people. It is no answer to this argument that this is a private Act, and the suggestion made by the party. This is true where the suggestions are matters of fact, but that is not the case here.



There was an alleged construction of a public Act, and which the Legislature were bound to look to and adopt or reject, as, in their judgment, the Act would warrant. And if the Act of 1782 did not extend to this case, most certainly the Act of 1787 ought not to have been passed. In my opinion, therefore, the Act of 1782 must have a prospective operation, and apply to the will in question.

Nor is the other ground of argument, in my judgment, better founded. This seems to have been suggested by the difference in the phraseology between the Acts of 1782 and 1786. By the former, the estate in fee tail is converted into a *fee simple*, and by the latter into a *fee simple absolute*. This difference, however, does not extend throughout the Act, for, in the second section of the Act of 1786, the term *fee simple* is used in the same sense with *fee simple absolute* in the first section. But if it were not so, it would make no difference in the construction of the two statutes. The terms *fee simple* and *fee simple absolute* have one and the same meaning. Littleton (sect. 1.) says, a tenant in fee simple is he who hath lands or tenements to hold to him and his heirs forever; and it is called fee simple, or *feodum simplex*, because it signifies a lawful and pure inheritance. Coke, in his Commentary, adopts the same definition, and says, that *simple* is added to *fee* for the purpose of showing that it is descendable to the heirs generally, without restraint to the heirs of the body, or the like. And he uses the terms, *simple* and *absolute*, as synonymous, when subjoined to fee. Thus, says he, the more apt division of a fee is into fee simple or absolute, conditional, and qualified or base. For the word simple properly excludeth both conditions and limitations that defeat or abridge the fee. It would be a very strained construction of the Act of 1782, to say it only converted fee tails into conditional fees, as at common law. The result of the opinion of the Court accordingly is, that the Act of 1782 operated prospectively, and of course extended to the will of Thomas Hicks; that the fee tail general, devised to his sister, Mary Hicks, was by the statute converted into an estate in fee simple. And if so, it is not denied but that the defendant has

shown a good title to the premises in question, and is entitled to judgment.

Judgment for the defendant.

WILLIAMS, R. P. 50; Tiedeman, R. P. 36; *Van Rensselaer v. Poucher*, 5 Denio, 35.

#### HOW CREATED BY DEED.

**As a general rule the word "heirs" was necessary in instruments at common law to create a fee-simple estate.**

BUFFUM *v.* HUTCHINSON,

Supreme Judicial Court of Massachusetts, 1861.

1 Allen, 58.

MERRICK, J. This is a real action to recover possession of the tract of land described in the writ, being part of lot No. 6 in the third range which was laid out and assigned by the town of Lynn to Matthew Estes in 1706. The demandants derive their title by a regular series of conveyances from said Matthew Estes; deducing their title, among other conveyances, from deeds from the heirs of John Ireson and from Amos Dorman. Their title in this manner being shown to be complete, they are entitled to recover unless the objections relied upon by the tenants are sufficient to prevent it.

It is first objected that the demandants are estopped from setting up their title under the conveyance from the heirs of John Ireson, by reason of the covenants contained in a certain deed of partition made and executed by them and certain other persons, proprietors of certain parts of the tract of land known as the "Rocks Pasture." This deed bears date and was executed on the 22d day of November, A. D. 1813. By the terms of it, six acres and eighty poles in the sixth lot in the third range, on the eastern side of said lot, were set off and assigned to Jacob Ingalls. By the same deed, eight acres and one hundred poles were also set off and assigned to the heirs of John Ireson. Both of the lots thus assigned and set off to Jacob

Ingalls and the heirs of John Ireson include the demanded premises. And the several proprietors, parties to the said deed, "do for themselves, their heirs, executors, and administrators covenant and grant to each other that he or they shall thenceforward peaceably and quietly have, hold, possess, and enjoy the same" lots set off and assigned to them severally in and by said deed, "free from all right and claim whatsoever of them or either of them, or any person claiming from or under them, forever." The tenants insist that as the six acres and eighty poles set off and assigned to Jacob Ingalls include the demanded premises, the demandants are estopped, by the covenants of the heirs of John Ireson, from claiming the same under deeds from them. But whatever may have been the right of Jacob Ingalls, derived under the deed of partition, the tenants do not show that they are entitled to the rights thereby acquired by him. The tenants are the heirs-at-law of Jesse Hutchinson, Jr., to whom the demanded premises were conveyed by the warranty deed of Sidney Ingalls. But it does not appear, nor is there anything in the facts reported to show, that there was any connection between him and Jacob Ingalls, or that the title of the latter, whatever it was, ever came to him. On the contrary, the demandants hold under deeds from the heirs of John Ireson, to whom the same demanded premises were, by the deed of partition, in direct and explicit terms assigned and set off. As against all persons, therefore, except Jacob Ingalls, they had a clear and complete title; and as Sidney Ingalls shows none derived from Jacob Ingalls, neither he, nor the tenants claiming under him, can insist upon an estoppel by force of the covenants in the deed of partition.

But the demandants, in tracing their title from Matthew Estes, hold under a deed from Amos Dorman, as one of the intermediate conveyances. And the tenants claim that they derive title from the deed of Dorman dated January 4, 1847, written on the back of a deed of Sidney Ingalls to Jesse Hutchinson, Jr., of the same date. It does not appear from the facts reported whether this deed of Dorman was made before or after the conveyance by him of the demanded premises under which the

demandants derive their title ; if it was afterward, it is very clear that Hutchinson could take nothing by it. But whether it was before or afterward is immaterial to the present issue ; because the deed which names no grantee, but which being written on the back of the deed to Jesse Hutchinson, Jr., it is contended must be construed to be a conveyance to him, contains no words of limitation, and therefore conveyed only a life-estate. The word " heirs " is essential in a deed of conveyance to create an estate in fee ; and if a man purchase lands to himself forever, or to him and his assigns forever, he takes only an estate for life : 4 Kent Com. 6. The grantee, Jesse Hutchinson, Jr., having deceased, the life-estate which he acquired by the deed of Dorman, if in fact he took anything by it, is at an end ; and the tenants therefore cannot avail themselves of the estate thus conveyed.

The tenants, however, further rely upon a deed of Dorman to Albourne Oliver, conveying a certain undivided part of the land in " Rocks Pasture," in which he excepts, among other lots, " about two-thirds of the sixth lot in the third range of said ' Rocks Pasture,' sold to Jesse Hutchinson." This exception has some tendency to show that he had made a conveyance of some estate to Hutchinson ; but as the only conveyance of that kind shown to have been made by him is by deed, and written on the back of the deed of Sidney Ingalls, and as that was the conveyance only of a life-estate, which has been terminated by the death of the grantee, the tenants obviously can derive no advantage from it.

It follows from these considerations that the exceptions to the rulings of the presiding Judge cannot be sustained, and that the verdict for the demandants is to stand, and judgment is to be entered upon it.

Exceptions overruled.

ARMS v. BURT,  
Supreme Court of Vermont, 1827.

1 Vt. 303.

HUTCHINSON, J., delivered the opinion of the Court:

The plaintiff's title, being by virtue of a levy of an execution in his favor against one Erastus Burt, the great questions that arise are, whether Erastus had any title that could pass by levy? and whether this levy is sufficient to vest that title in the plaintiff? The case allowed shows the title to the premises once in Jonathan Burt, the defendant, and also, that, whatever title Erastus Burt had at the time of the levy, he derived from said Jonathan, by virtue of the lease referred to in the case.

Upon the trial at the County Court the counsel for the defendant rested their defense principally upon the writing signed by said Jonathan and Erastus in the margin of the record of said lease. This was relied upon as a surrender by Erastus of the lease, and all his interest derived from it, to said Jonathan. We are now called to decide the legal effect of that writing. But the nature of the lease must be first understood.

The lease is not a lease for years merely; but conveys a present fee, determinable upon the non-performance, by Erastus, of the conditions and duties named in the lease on his part to be performed. It has the formalities of a deed, signed, sealed, witnessed, and recorded. It runs to him, his heirs, and assigns; and continues so long as *wood grows and water runs*. These terms extend as fully beyond the use of land as the term *forever*.

But this title was to cease, and the land revest in Jonathan, upon the failure of Erastus to perform the stipulation on his part. Now, what should be the effect, upon this lease, of the writing in the margin of the record, signed by the parties to the lease?

It probably is not what was intended by the parties. It is not a conveyance back of the estate, for it has no seals nor acknowledgment. Nor can it be a discharge of the covenants of

Erastus, for it contains no consideration. None is pretended but mutuality, and that does not exist. Nothing passes, or is discharged, from Erastus to Jonathan, to stand as a consideration for the discharge of Jonathan's claim on the covenants of Erastus. This writing, as it now appears, must be wholly inoperative. It can neither be a surrender nor discharge of the title of Erastus, nor discharge of his covenants. Had it been so executed as to reconvey the estate to Jonathan, that would have formed a good consideration to support the same instrument, as a discharge from Jonathan to Erastus of his covenants.

The case shows that the defendants, on trial, offered to prove a failure of Erastus to perform the conditions of said lease, on his part, before said writing in the margin was executed, and also that ever since that time, he has wholly abandoned the premises, and neglected every stipulation of the lease. This was rejected by the Court, and probably ought to have been admitted; it certainly ought, if it had been offered in connection with evidence to show that said Jonathan had re-entered upon the premises for a breach of condition. The nature of the lease being as above described, Jonathan was not obliged to re-enter; but might stand aloof and rely upon his remedy upon his covenants against Erastus. Or if he chose to re-enter upon breach of the condition, he might do so, and thereby the estate would revest in him; and Erastus be no longer liable for that support he had covenanted in the lease. And the recovery of Jonathan upon his covenants in such case, would only be for the damage he sustained before his re-entry. But it seems Jonathan was in possession before this suit was brought. Probably, that might have been urged as a sufficient re-entry to revest the estate.

Now, if such an estate as Erastus had in the premises be liable to levy of execution at all, the plaintiff, by his levy, could gain no better or greater estate than he found in Erastus. That is, a present estate in fee, to hold upon the performance of that multifarious condition; and, on failure to perform, lose the estate wholly, by its reverting to said Jonathan.

As the merits of this part of the case have not been tried at all, a new trial must be granted.

An objection is now raised to the levy under which the plaintiff claims to have obtained the title of Erastus Burt. This passed *sub silentio* at the trial; but as the case is drawn up, this question is now fairly presented. As a new trial is granted, we are disposed to inform the parties what views the Court entertain upon this point also.

Upon recurrence to the levy, we find that the officer did not levy upon the land, but upon the right, title, and interest of Erastus Burt in and unto the land. The land itself is afterward well described; and the officer returns that the appraisers appraised the premises. Yet the word *premises* must mean what was levied upon, which we find to be Erastus Burt's interest in the land. The levy should have been upon the land itself, and the appraisal should have been of the land itself, subject to such an incumbrance, describing it particularly.

As the levy is, we may ask, what interest had Erastus in the land? What did the sheriff suppose it to be? What did the appraisers suppose it to be? The learned counsel here in Court differ much about this interest; and how can it be ascertained how the appraisers viewed it?

In the case of *Elijah Paine v. Lindley Webster et al.*, decided at St. Albans, on the present circuit, a similar question was raised and fully considered, and the levy considered void. We consider this levy void also. A new trial is granted.

WILLIAMS, R. P. 144; *Jackson v. Myers*, 3 Johns. 388; *Society v. Sharon*, 28 Vt. 603; *Sisson v. Donnelly*, 36 N. J. L. 432; *Edwardsville Ry. Co. v. Sawyer*, 92 Ill. 377; *Foster v. Joice*, 3 Wash. C. C. 498. *Contra*: *Merritt v. Disney*, 48 Md. 344; *Cole v. Lake Co.*, 54 N. H. 242.

## EXCEPTIONS.

## A

**When created by will the word "heirs" is not necessary.**

CAMPBELL *v.* CARSON,

Supreme Court of Pennsylvania, 1825.

12 S. & R. 54.

DUNCAN, J. The will of George McDowell gives rise to this controversy. The question raised by it is: Whether the testator devised to his wife Frances, his lands in Westmoreland County, in fee, or she only took a life estate? The devise is as follows: "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner and form: First, I give and bequeath to Frances McDowell, my dearly beloved wife, whom I likewise make my sole executrix of this, my last will and testament, all and singular my lands, messuages, and tenements in Westmoreland County, to be by her freely possessed and enjoyed." He then bequeaths to her certain specific legacies, and then proceeds: "I also bequeath to my niece, Martha Glyn, a certain tract or piece of land, situate in Westmoreland County aforesaid, containing one hundred acres lying on the east side of the spring on the said land." The testator died without issue. The lands in Westmoreland County were held by settlement right. The testator had been driven from them by the Indians some years before he made his will, and the settlers had not returned. If one traveled out of the four corners of the will, in search of the intention of the testator, it would be inconceivable that he could intend a life estate in a small improvement, without other than cabin buildings, deserted for years, and the cleared land again grown up, on which no purchase-money had been paid, and depending on the will of the Legislature, which might, by not extending the time of payment, cast the whole burden of it on the tenant for life, or make void the inceptive right. But the case does not require us to make a distinction between such an inceptive



title and one consummated by patent. In every case, where a testator devises his land without more, his *prima facie* intention is to give the whole interest. Judges have found themselves constrained, however, to decide that the words, I devise my plantation, my farm, my house, my land, carry only an estate for life: 3 Cranch, 137. But where it appears from the whole will taken together, that the testator intended a fee, if there are any words equivalent to perpetuity, it will be held a fee, and the constant struggle of the Courts has been to seize hold of any word or any provision to effectuate the intention. Where anything is directed to be done, or any intention of the testator to be accomplished, where the words of the devise give only an estate for life, and where such estate would be insufficient to answer the end a fee passes. The implication must be necessary or manifest, and not dubious or merely probable. Where, from the whole context of the will, it appears the testator intended a fee, and the conscience of a Judge so informs him, it is his duty to construe it a fee. I do not mean by this that the words land, plantation, farm, house, *ex vi termini* will do; but any words in the will showing the testator did intend a larger estate than for life, or such larger estate is necessary to answer his declared purpose, to accomplish his views. Every case of this sort depends on its own particular circumstances, and is individual. In construing a will, though a fee is not given by the devising clause, yet, if there is anything on the face of the will to indicate an intention to give a fee, any words *equivalent* to words of perpetuity, anything in the four corners of the will from which a fair and demonstrable inference can be drawn of an intention to give a fee, to the disherison of the heir, a fee will pass. Equivalent words do not depend on their technicality, but on their reasonable construction, their plain, natural meaning. I will instance some cases in which the words have been construed as tantamount: I devise all I shall die possessed of: I devise my part; my share; my interest. So, a devise of land wholly to A.: all my worldly substance, or effects, real and personal: all my landed property. It is always a question of construction. If the

words denote only a description of the specific lands devised, and if no words of limitation are added, the devisee has only an estate for life. But if they denote the *quantum* of interest or property the testator had in the lands devised, the whole extent of his interest passes to the devisee. These very words—"to be by her freely possessed and enjoyed," have received a judicial construction; for in *Mudge's Lessee v. Blight*, Cowp. 352, a devise thus, "As touching my worldly estate, I devise the same as follows: to my two sons, T. M. and R. M., whom I make and ordain my sole executors, I give all my lands and tenements freely to be enjoyed and possessed alike," passed a tenancy in common, in fee, to T. M. and R. M. The free enjoyment must, as Lord MANSFIELD says, mean free from all limitations; that is, the absolute property. Subsequent cases in England may have put a different construction on the words, "freely to be enjoyed;" as free from impeachment of waste, free from incumbrances; but I am very free to declare that Lord MANSFIELD's construction is the most natural and reasonable, and that the other is but a remote probability; a possibility that the testator might so have intended them; but in my consideration they mean, the free enjoyment for all purposes against the heir. This is the fair meaning, the natural, common-sense construction; the other is a forced construction, straining the words against their common use and understanding; not to effectuate, but to defeat the testator's intention. They have been construed by this Court according to their usual acceptation, and the understanding of all mankind. In *Willis v. Bucher*, 2 Binn. 464, the Chief Justice puts this construction on them; and again, words not so strong—"I give my plantation to my son John, for him to improve and enjoy the same," were held to pass a fee in *Hoge v. Hoge*, 1 Serg. & Rawle, 144. I have no disposition to recede from the liberal cast of cases which effectuate the intention of the testator; far from it; without a disposition to overturn any settled principle on the construction of limitations in wills, I feel a strong inclination to construe them by a rule of common sense, which is as strong as any case can be.

To give to words their natural sense, unless some obvious inconvenience or incongruity would result from such construction, is the cardinal rule in the construction of wills. In addition to the words—"freely to be enjoyed," which I consider words of perpetuity, if the prefatory clause declaring the testator's intention to devise his whole worldly estate is taken in connection with the devising clause, which is always done where there is a clear intention for the purpose of explaining or enlarging the estate, here there is such an evident intention without anything to disconnect, without any interposing clause, that I must lay hold of it to effectuate the clear intention of the testator to give his wife a fee simple. On this branch of the case, *Winchester's Lessee v. Tilghman*, decided by the Provincial Court of Maryland, and affirmed in the Court of Appeals, 1 Harris & McHenry, 452, in which it was held, that "as to the worldly estate it has pleased God to bless me withal," and after several intervening devises, "I give unto my daughter Eliza three hundred acres of land, lying in Kent and Queen Anne's Counties, called Pharsalia," passed a fee, is very applicable. The conclusion of law is not, where there is a devise of land, a plantation, a house, without more, that because a fee was intended, therefore a fee is devised; but it is quite certain that if the intention to devise a fee is evident and manifest from the general scope of the will, taking into view all the circumstances and clauses in the whole will, and uniting them together, it will be construed a fee, and it is not material what words are used, whether technical or not, the meaning and intention being thus collected from the words or by necessary implication.

Judgment affirmed.

*Godfrey v. Humphrey*, 18 Pick. 537; *Fox v. Phelps*, 17 Wend. 393; *Wood v. Hills*, 19 Pa. St. 513; *Morrison v. Semple*, 6 Binn. 94.

## b

**So in deed to trustee the word "heirs" is not necessary.**

NORTH *v.* PHILBROOK,  
Supreme Judicial Court of Maine, 1852.

34 Me. 532.

RICE, J. This is a petition for partition. The rights of the petitioner depend upon the provisions of a deed from Joseph North and Hannah North to Henry W. Fuller, dated January 7, 1814, and a deed from Gershom North to James P. Philbrook, dated November 17, 1846.

The original estate was in Joseph North and Hannah North, his wife, in right of the wife. Gershom North was a son of Joseph and Hannah, who also had other children and heirs, and the petitioner is a daughter of Gershom.

Hannah North, one of the grantors to Fuller, died in February, 1819, and Joseph North, the other grantor to Fuller, died April 17, 1825. Ann North, wife of Gershom, deceased before her husband, but after the decease of both Hannah and Joseph. Subsequent to the death of Ann, Gershom married again, and died March 4, 1849, leaving the petitioner, a minor daughter by his second wife, his only heir.

The deed of trust from Joseph and Hannah North to Fuller contain no words of inheritance. The first point raised at the argument was as to the character of the estate which passed to the trustee by that deed. The petitioner contended that it was an estate of inheritance, because nothing short of such an estate would enable the grantee in that deed to perform the trusts provided in the deed, and carry out the manifest intention of the grantors.

As a general rule, such a quantity of estate will be held to be vested in trustees as is required for the performance of the trust; and therefore if land be given to a man, without the word heirs, and a trust be disclosed which can be satisfied in no other way but by the trustee's taking an inheritance, it has been held that a fee passes; so where there is a trust for

sale, that is a purpose which it is impossible to serve unless the trustee have an inheritance, "for if they are to sell a fee, they must have a fee:" Crabb on Real Property, § 1831, p. 594. So a trust to sell, even on a contingency, confers a fee simple as indispensable to the execution of the trust: Lewin on Trust and Trustees, 235.

Trustees must in all cases be presumed to take an estate commensurate with the charges imposed on them: 7 East, 99. Therefore, where lands are devised for a particular purpose, without words of inheritance, and the death of the devisee may defeat the object of the devise, he will take a fee. This doctrine is frequently applied to trusts created to support estates of inheritance: 8 Vin. Abr. 262, pl. 18.

When lands are granted to a trustee without words of perpetuity, he will by implication of law take a fee, if such estate be necessary to fulfill the objects of the trust: *Welch v. Allen*, 21 Wend. 147.

The grant to Fuller not only authorized him to go into the immediate possession of a portion of the estate, but also, to "sell so much of the above-granted premises and execute a good and sufficient deed thereof, as shall amount to the sum of \$800," for the purpose of building a house, but further stipulated that, "provided the said land shall not have been sold nor the said building erected, during the lifetime of the said Joseph, the said Fuller is hereby authorized, after the decease of the said Joseph, to sell so much of the above-granted premises as shall amount to the above sum and for the purpose aforesaid, out of such part of the premises as he shall think proper."

To comply with these provisions it would seem to be necessary that the trustee should have an estate in fee, and that such was the intention of the grantors is obvious when all the provisions of the deed are taken into consideration.

The estate of the trustee being thus enlarged, by operation of law, its operation upon the rights of other parties must be considered. The grantors reserved to themselves, during their natural lives, the use of the principal part of the estate, re-

mainder over to Gershom and Ann North during their natural lives, and lastly, after the death of Gershom and Ann, so much of the estate as remained unsold "to descend to, and vest in, the heirs of Joseph North and Hannah North, his wife."

At what point of time did the estate vest in the heirs of the grantors? This question was much discussed at the argument. But from the view we take of the case it is wholly immaterial, so far as the rights of the petitioner are involved, how this question is determined, and it is therefore unnecessary at this time to enter upon a discussion of the distinctions which exist between vested and contingent remainders. The rights of other parties, not now before the Court, may be found more involved in the consideration of that branch of the law.

If, as is contended by the respondents, the heirs of Joseph North and Hannah North became known at the death of Joseph, and the remainder then vested in these heirs, with the right of possession of the estate after the decease of Gershom and Ann, then as a legal consequence, Gershom, being one of the heirs of Joseph and Hannah, became seized of a vested remainder in fee, which being a transferable interest, passed by his deed, dated November 17, 1846, to Philbrook, leaving no interest to be inherited by his daughter, the petitioner.

If, on the other hand, as is contended by the petitioner, the estate remained contingent until the death of Gershom, and then, according to the terms of the deed of trust, vested in the heirs of Joseph and Hannah, the petitioner is equally excluded. She being the heir of Gershom and not the heir of Joseph and Hannah, and the interest of Gershom according to this construction of the deed being an equitable life estate only.

But it is strenuously contended that the petitioner is the heir of her grandparents, Joseph and Hannah North, and therefore entitled to recover.

In a recent case in Massachusetts, *Brown et al. v. Lawrence et al.*, 3 Cushing, 396, which in all material points is strictly

analogous to the case at bar, this question was distinctly before the Court, and directly decided. The action in that case was brought by grandchildren of the grantor, claiming as heirs of the grantor after the termination of an intervening life estate in their father, who during his life, had aliened his interest in the estate.

In giving the opinion of the Court, SHAW, C. J., says: "They cannot make themselves heirs of the grandfather, because their father, through whom they must claim, was living at the time of their grandfather's decease; and it is only when a son or daughter dies before the father, leaving children, that such children are heirs of a grandfather, or other more remote ancestor. These children were not born when the testator died; their father was then his heir, and became a new stock of inheritance to these demandants. If the estate vested in him, he had a capacity to alienate it, and did alienate it, by his deed to the city; if the estate did not vest in him, then nothing came to these demandants, as his heirs."

The Court are unable to perceive any principle upon which the petitioner can recover, and according to the agreement of the parties a non-suit must be entered.

*Neilson v. Lagow*, 12 How. 98; *Stearns v. Palmer*, 10 Met. 32; *Fisher v. Fields*, 10 Johns. 495; *Welch v. Allen*, 21 Wend. 147; *Newhall v. Wheeler*, 7 Mass. 189; *Gould v. Lamb*, 11 Met. 84; *Oates v. Cooke*, 3 Burrows, 1684.

## C

**So in the case of corporations.**

WILCOX *v.* WHEELER,

Supreme Court of New Hampshire, 1867.

47 N. H. 488.

BELLOWS, J. This cause is heard upon bill and answer. The defendants claim under William Simpson, alleging that by his deed to Mr. Britton only an estate for life was granted. The substance of that deed is, that, in consideration of

\$100 paid by said Britton, agent for the Proprietors of Orford Bridge, Simpson conveys to him for the use of that corporation, and to his assigns, two parcels of land, one being described as a road four rods wide from the bridge to the main road, and the other apparently for a toll house; to have and to hold the same to said Britton in trust, as aforesaid, and to his assigns.

By his deed, by force of the statute of uses, the title vested at once in the corporation, as it had full capacity to take; and nothing indicates any purpose that the legal estate should be kept on foot in Mr. Britton. The conveyance was made to him, probably, because conveyances directly to corporations had not then become quite familiar. Had it been conveyed to the corporation directly, then, as a corporation aggregate never dies, it would be a fee simple without words of succession or inheritance. Had it been a sole corporation, words of succession would have been necessary.

This general doctrine is well settled: 4 Greenl. Crim. Dig. 279; 4 Kent's Com. 7; where it is said that the reason, why, in deeds to corporations aggregate, the word heirs or successors is not necessary, is, "because in judgment of law a corporation never dies, and is immortal by perpetual succession." So is Co. Lit. 9, 6.

Such being the law where the grant is directly to a corporation aggregate, it would seem not to be unreasonable to apply the same doctrine to a grant to a trustee for the use of such a corporation, when it is of such a character that the whole title at once vests in the corporation, making it substantially a grant to the corporation.

Upon this point the law is well established, that if there be a conveyance to a trustee, and the nature of the trust is such as to require a fee, then by necessary implication the trustee will take an estate of inheritance, although there be no words of limitation.

In the case of devises this has long been the law, and even where the purposes of the trust might *probably* be accomplished without a fee; or, in other words, if by *possibility* the



purposes of the will might not be answered without the trustee had a fee, the will would be so construed : *Shaw v. Weigh*, 2 Str. 798 ; *Willis v. Lucas*, 1 P. Wms. 472 ; *Collin's Case*, 6 Co. 16 ; and *Ackland v. Ackland*, 2 Vern. 687 ; *Gibson v. Montfort*, 1 Ves. Sen. 485 ; *Oates v. Cooke*, 3 Burr, 1684. So the interest to give a fee would be inferred from the fact, that, by possibility, a fee might be necessary to effectuate the trusts, and the leaning of the Courts was very strong so to construe a devise.

The same rules are applied to grants, and it was so distinctly laid down in *Cleveland v. Hallet*, 6 Cush. 403, by SHAW, C. J., as an exception to the rule requiring the use of the word *heirs* as well established as the rule itself, viz. : that when a conveyance is in trust, and the trusts are of such nature that they do, or by possibility may, require a legal estate in the trustee beyond that of his own life, then without words of limitation in the conveyance to the trustee, he shall take a fee.

In *Newhall v. Wheeler*, 7 Mass. 189-198, it was held, PARSONS, C. J., that though no words of limitation are used, the estate of the trustee shall be commensurate with that of the *cestui que trust*.

So is *Stearns v. Palmer et al.*, 10 Met. 32, where the grant was in trust for the use of "the inhabitants of the first parish in Springfield, and their heirs, forever, for a burying yard."

So is *Gould et al. v. Lamb et al.*, 11 Met. 84, where the conveyance is to A. B., to have, etc., as he is trustee under an indenture tripartite, which showed the intention to be to give more than a life estate ; and so it was held that a fee passed without words of limitation.

So in *Brooks et al. v. Jones*, 11 Met. 191, which was a mortgage to W., treasurer of a corporation, to have and to hold, etc., to him, the said treasurer, and his successors in office, to his and their use and behoof forever, the condition was to pay a sum of money to the treasurer and his successors in office, and it was held that W. took a fee in trust for the corporation, although the word *heirs* was not used ; but the intention was plain, and no stress was put upon the term *forever*.

The same doctrine is laid down by Chancellor KENT, in *Fisher v. Fields* 10 Johns. 494, 505. So is *Villiers v. Villiers*, 2 Atk. 72.

In *Welch v. Allen et al.*, 21 Wend. 147, it is held that where lands are granted to a trustee without words of perpetuity, he will, by implication of law, take a fee, if such estate be necessary to fulfill the objects of the trust.

So the doctrine of *Cleveland v. Hallett*, before cited, is confirmed in *Attorney-General v. Prop. Federal St. Meeting House*, 3 Gray, 1.

The conveyance to Glen, Hall, Shaw *et al.*, for themselves, as a committee chosen and appointed by the congregation of the Presbyterian meeting house in Long Lane, etc., to have and to hold the land in their said capacity, and to their successors forever, but to and for the only proper use, and benefit, and behoof of the said congregation, forever, and for no other use; and it was held that the trustees took a fee upon the principle before mentioned, and no stress is put on the word *forever*, and the corporation was not incorporated.

So in *King v. Parker et al.*, 9 Cush. 78, where the grant was to B., "in trust to and for the use of the Free Masons Lodge in Boston, known by the name, etc., to their only proper use, benefit, and behoof forever," it was held that this proved the fee.

The question, then, is, whether this conveyance to Mr. Britton, agent of the bridge corporation, to be held in trust for the corporation, passed the fee without words of limitation; that is, whether the intention to give the corporation the fee can be gathered from the grant. Had it been directly to the corporation, being a corporation aggregate, the fee would have passed; and in all such cases where the conveyance is through a trustee to hold for the use of such corporation, the intention to make it perpetual is to be inferred, and so are the Massachusetts cases already cited, we think.

Here the grant was of two pieces of land, for a road and toll house, both essential to the use of the bridge as much so as the land upon which stands the Federal Street Church; and it

is impossible to suppose that it was intended to grant an estate for the life of Mr. Britton only, which might have ended in one year. Such being the case, it must be considered that the fee passed, and at once vested in the corporation.

In respect to some of the Massachusetts authorities, which hold that where the purposes of the trust cannot be answered without a greater estate than for life, then by implication a fee will pass, it is urged by defendants' counsel, that the intention to give a greater estate is manifested by the use of the term *forever*, which in this case is wanting.

It is obvious, however, that this term is not one of limitation, and only bears upon the question of intention, and if that is ascertained by the nature of the grant, or the language used, whatever it may be, the law will give effect to that intention, and in this case we think the intention to grant a fee is very clearly to be inferred from the nature of the grant itself.

At the argument upon the bill and answer, the defendants contend that the bill should be dismissed for want of equity, upon the ground that the plaintiffs have not established their title at law, and no case of irreparable injury is disclosed.

The bill alleges that, for many years, something like fifty, four or five families upon the bridge road have been, and still are, supplied with water by the plaintiffs, and those under whom they claim, by means of the pipe laid in this road, for which the plaintiffs and their predecessors have received a yearly rent, and this is substantially admitted by the answer, at least as to some of these families. The bill also alleges that, during all this period of fifty years, the plaintiffs and their predecessors have so used this pipe in said road under a claim of right, and in that way have acquired a valid title to the easement by prescription.

The bill then alleges that the defendants threaten to cut off this pipe and so interrupt the supply of water to these families, to the great and irreparable injury and damage of the plaintiffs, and the occupants of the houses upon the said bridge road.

The bill also alleges that the defendants pretend to have ac-

quired a right to do the acts so threatened by virtue of a quit-claim deed from one Simpson, of the land over which said road runs, but the bill alleges that said Simpson had no right or title to said land.

The answer says that, whether the plaintiffs and their ancestors claimed a right to lay and continue their said pipe in this road, against all persons, they do not know, but they allege they have no such knowledge or belief; and they set up a title to the land by the deed of the heirs of Mr. Simpson, who were entitled to it on the death of Mr. Britton, upon the ground that only an estate for the life of Mr. Britton was conveyed. A copy of Simpson's deed is by agreement made part of the answer, and they allege that no right by prescription was, or could be, acquired against the heirs of said Simpson, or these defendants, during the continuance of the life estate.

And this is the defense set up, namely, a title to the road derived from the heirs of Mr. Simpson, claiming that his deed only gave to Mr. Britton a life estate, but not directly denying the jurisdiction of the Court, or the allegation in the bill that irreparable damage would be caused to the families on the bridge road, and to the plaintiffs by cutting off the pipes.

It may be assumed, then, that, by cutting off the pipe, these families would be deprived of water for their houses, and that the plaintiffs would be injured as alleged in the bill, and it is apparent that the injury would be serious, and in respect to these families, at least, would, in its nature, be irreparable. On the other hand, the restraining of the defendants from cutting this pipe can cause them no injury whatever, and this may properly be considered in many cases in determining whether equity will exercise its summary power.

It is true that the persons occupying these houses are not, formally, parties to this suit; but we think the plaintiffs may fairly be regarded as representing them in this proceeding. They have undertaken to supply them with water; the legal title to the aqueduct is in the plaintiffs; and, although they may not be legally bound to continue the supply of water for any fixed period, still they are interested to do so, and have

provided all the money to accomplish it. If, then, the defendants cut off this aqueduct, they not only deprive these families of water for the time being, but may compel them to seek a supply from other sources, and thus cause a permanent injury to the plaintiffs by diminishing the value of their spring. Looking at it upon a larger scale, where a whole village or city is supplied with water in a similar manner, we should not hesitate to hold the injury caused by destroying the aqueduct used for such supply, as causing an injury which might well be deemed irreparable; nor should we hesitate to decide that the proprietor of the aqueduct might well be regarded as entitled to represent the persons so supplied by him, so far as to maintain a bill in equity to prevent such injury.

Especially would it be so where, as in this case, there had been by such proprietor an uninterrupted use of the aqueduct for many years, and the claim of the other party was to be determined by the legal construction of a deed.

We are of the opinion, therefore, that this objection cannot prevail, and that the plaintiffs are entitled to a decree.

Perpetual injunction decreed.

*Nicoll v. N. Y. & E. Ry.*, 12 N. Y. 121. In corporations aggregate the word "successors" is not necessary to create a fee: *Cong. Society v. Stark*, 34 Vt. 243. Otherwise in corporations sole: *Overseers v. Sears*, 22 Pick. 122.

## d

**So if created by legislative grant.**

PROPRIETORS, ETC., *v.* PERMIT,

Supreme Court of New Hampshire, 1830.

5 N. H. 280.

**RICHARDSON, C. J.** The question is, whether the demandants have shown a title to the demanded premises? These premises are not within the limits of the township of Enfield, as described in the charter, but are in a gore of land left be-

tween the territory described in the charter of Enfield and the township of Grantham. It can hardly admit a doubt that the gore was left out of the charter of Enfield by mistake. But this mistake cannot be corrected by a court of law. There is no ambiguity, either patent or latent, in the charter, in relation to the southerly line of Enfield. There is nothing on the face of the charter that indicates, in the slightest degree, an intention that the gore should be included in the township of Enfield, and to admit extrinsic proof that sixty-eight degrees were inserted in the charter by mistake, instead of fifty-eight degrees, would be a violation of one of the soundest and best-established rules of evidence: *Jackson v. Bowen*, 1 Caine's Rep. 358; *Jackson v. Sill*, 11 Johns. 201; *Jackson v. Stanley*, 10 Ib. 133; *Jackson v. Hart*, 12 Ib. 77; *Fitzhugh v. Runyon*, 8 Ib. 375; *Jackson v. Wilkinson*, 17 Ib. 146; *Jackson v. Marsh*, 6 Cowen, 281.

Whether a mistake in a charter can be corrected in this Court, in a suit between the State and the proprietors of the township, by virtue of our general jurisdiction, or under the statute of February 6, 1789, which empowers this Court to try all causes touching the validity of grants by the State, and the performance of the conditions in such grants, it is unnecessary to consider in this case, because, however that may be, it is clear such a mistake cannot be corrected in a suit between individuals: *Jackson v. Marsh*, 6 Cowen, 281; *Johnson v. Lawton*, 10 Johns. 23.

It then remains to inquire, whether the said Acts of the Legislature, passed March 28, 1781, and June 18, 1802, have vested in the proprietors of Enfield the gore in which the demanded premises are situated? On this question it seems to us there can be no doubt. Application was made to the Legislature to correct a mistake in the charter of Enfield. It seems not to have been disputed that there was a mistake, and a committee was appointed to correct it. The committee made a report, by which the mistake, with the assent of all concerned, was corrected, and the line of Enfield so established as to include the said gore in that township; and that report is

made by law conclusive between the parties. In those proceedings the State and the proprietors of Enfield and Canaan were clearly parties. The said Acts of the Legislature show conclusively, that the intention was that the gore should be vested in the proprietors of Enfield. There are no particular terms necessary to constitute a grant by the Legislature: *Ward v. Bartholomew*, 6 Pick. 409. Individuals may establish a line between their lands by agreement: *Rockwell v. Adams*, 7 Cowen, 761; *Doe v. Thompson*, 5 Ib. 371; *Jackson v. Talmadge*, 4 Ib. 450; *Jackson v. Smith*, 9 Johns. 100.

And when the Legislature have by statute established a particular line, as the line of a township, the State is estopped to say that the title of the proprietors of the township does not extend to such line. It is clear that a State may be estopped by the Acts of its Legislature: 3 Pick. 224.

But the township of Grantham is described in the charter as bounded on one side by a line running south fifty-eight degrees east by the south line of Enfield; and it is contended that by a well-known rule of construction the line of the town of Enfield, and not the point of compass, is to fix the north line of Grantham. If it appeared that the south line of Enfield was, at the time when the charter of Grantham was made, a known marked line, which had been previously run out and monuments erected to designate it, it would certainly deserve very serious consideration whether the proprietors of Grantham could not hold to such line.

But it does not appear that when the charter of Grantham was made the south line of Enfield had been actually located, and there was then nothing to designate it except the point of compass mentioned in the charter of Enfield. What rule of construction is to apply in such a case it will be time enough to consider when the proprietors of Grantham, or some person claiming under them, shall see fit to raise the question. We are of opinion that the actual location of the township of Enfield by the Legislature is valid against all the rest of the world. It does not appear that the tenant sets up any title under the

proprietors of Grantham, and the non-suit in this case must be set aside.

Rutherford *v.* Greene's Heirs, 2 Wheat. 196. Nearly all the States have made the word "heir" or "heirs" unnecessary in the creation of a fee-simple estate: 6 Am. & Eng. Encyc. Law, 876; Minn. Gen. Stats. 1878, ch. 40, § 4.

### INCIDENTS OF A FEE-SIMPLE ESTATE.

**Among the inseparable incidents of a fee-simple estate are: The right of alienation; descent according to law; the right of curtesy; the right of dower; and liability for the debts of the owner,**

#### ¶

#### **Right of alienation.**

**Any condition in a deed restricting the grantee's power of alienation of the fee is void as repugnant to the grant.**

#### BLACKSTONE BANK *v.* DAVIS,

Supreme Judicial Court of Massachusetts, 1838.

21 Pick. 42.

The defendant claimed title under the following clause in his father's will: "I give to Erastus, my son, the use of the Bartlett farm in Millbury containing about 120 acres. Said farm is not to be subject or liable to conveyance or attachment."

WILDE, J. This is an action of trespass *quare clausem fregit*, and the only question submitted by the facts agreed is the question of title, the breaking and entering of the close by the defendant being admitted. It is not questioned that the devise respecting the Bartlett farm is a good devise to pass the farm to the devisee. By the devise of the profits, use or occupation of land, the land itself is devised. Whether the defendant took an estate in fee or for life only, is a question not material in the present case. The sole question is, whether the estate in his hands was liable to attachment and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so



liable, notwithstanding the proviso or condition in the will, the Court cannot entertain a doubt.

A condition in a grant or devise, that the grantee or devisee shall not alienate, is void because repugnant to the estate: Co. Lit. 223 *a*. And so it is as to a condition annexed to a gift or sale of a term for years, or any other chattel real or personal. A condition or proviso to restrain or prohibit the operation of an attachment and levy of an execution, is void for the same reason, and because it is contrary to law, which makes a man's property liable for the payment of his debts. A condition that the grantee or devisee shall not alienate for a particular time or to a particular person or persons, is good. So, in a devise to a minor provided he shall not come into possession, occupy, or have any advantage of the estate during his minority except through his guardian, who is to lease, occupy, and improve the estate, the proviso is good and valid in law: *Smithwick v. Jordan*, 15 Mass. R. 113.

The clause in the devise under consideration is without any limitation, and declares that the property devised shall not be subject to conveyance or attachment perpetually. Such a declaration or provision the testator had no authority to make. It was an attempt to impose a restraint upon property which the law will not allow, and the provision is clearly void.

Defendant defaulted.

*Kepple's Appeal*, 53 Pa. St. 211; *Lovett v. Gillender*, 35 N. Y. 617; *Gleason v. Fayerweather*, 4 Gray, 348. A restriction of all power of alienation for even a single day is void: *Mandlebaum v. McDonell*, 29 Mich. 78.

**Restriction of alienation for a limited time has been upheld.**

LANGDON *v.* INGRAM'S GUARDIAN,  
Supreme Court of Indiana, 1867.

28 Ind. 360.

GREGORY, J. Fletcher Ingram's guardian filed a petition to sell the interest of the ward in a part of a lot in the city of Lafayette, for the reason that the property is situated in a part

of the city where there is great danger of the destruction of the buildings by fire ; that the property is considered a dangerous risk by the several insurance companies having agencies in the city ; so much so, that they refuse to insure a part thereof against loss or damage by fire, and insure the other part at high rates ; that in case of the destruction of the buildings, there is no money belonging to the ward with which to rebuild. The only interest the ward has in the property is that derived by the will of his deceased father. That part of the will relating to this property is as follows :

“The residue of my estate, being that situated on said market space, I give and devise to my wife, in trust to manage the same in such way as she may deem most prudent, to rent the same, receive the rents thereof and dispose of them as follows :

“1. To pay all taxes, expenditures for insurance, repairs, rebuilding, or making any changes she may find advisable in said buildings on said realty, or any other outlays on account thereof.

“2. If the other means hereby provided for that purpose shall prove insufficient to pay my debts, as above provided, then said rents to be appropriated to that purpose, till the same shall pay any balance of said debts.

“3. To appropriate to her own use, absolutely, the one-fourth of the residue of said rents, during her natural life ; that is, one-fourth of the net income from said realty, after any debts chargeable thereon are paid.

“4. To appropriate to the use of my three children the remaining three-fourths of said net income, one of said fourths to each of them, as follows : One of said fourths to be paid over to my daughter quarterly, or at such other times as received and ascertained ; such payment to be to her personally, and on her separate receipt, and neither she alone, or jointly with her husband, to have power to anticipate, charge, incur, or transfer the same, or any right thereto, or to any part thereof. To use in her discretion the two of said fourths that are given to my two sons, one for the benefit of each, for

the boarding, clothing, and schooling of each, or otherwise, until my youngest son shall arrive at full age; after which time my said wife, in her discretion, may convey to all or any one or two of my said children, by deed, the one-third of said realty, subject to her right to one-fourth of the net income arising therefrom, and said deed shall operate first, to vest a title free from any trust, or any one may convey his or her interest therein to a third party by deed, in which my wife, as such trustee, shall join; but, except as above, my son shall have no power over the same, nor in any mode anticipate, incumber, or transfer the same, or any interest therein, or in said income, while said trust continues. But said trust shall terminate with the death of my wife, and one-third of said realty vest absolutely in each of my said children, unless by deed or will my wife shall direct said trust to be continued, as to the share of any or all of them, and name a trustee or trustees, in which event the same trust created shall continue as to the share of the one or more, as thus directed by my said wife. In the event of the death of any one of my children, not leaving a descendant alive, the share of such one shall continue part of the trust property, the net income therefrom to be equally divided between my wife and the survivors. If a second child die without descendant alive, the share of such one, both original and that taken as the survivor as aforesaid, shall continue part of the trust property, and the net income divided equally between the last survivor and my wife—this to continue during the life of my wife; but the absolute title to each share, original or accruing in said events, to survive to the surviving children or child. If all my children shall die without descendants alive, then the whole property to vest absolutely, in fee simple, in my wife.”

The testator left surviving him, his wife and two children—Elizabeth, intermarried with Byron W. Langdon, and Fletcher Ingram, the youngest son, Robert J., having died intestate, without issue, before the death of the testator. The Court below decreed the sale of the ward's interest in the real estate described in the petition. Langdon and wife appeal to this

Court. It is claimed that the restriction on the power of alienation was removed by the death of the youngest son. We do not think so. As a general rule, a condition in a grant or devise that the grantee or devisee shall not alienate is void, because repugnant to the estate, but a condition that the grantee or devisee shall not alienate for a particular time, or to a particular person or persons, is good. So, in a devise to a minor, a proviso that he shall not come into possession, occupy, or have any advantage of the estate during his minority, except through his guardian, who is to lease, occupy, and improve the estate, is good and valid in law: *The Blackstone Bank v. Davis*, 21 Pick. 42.

It was the obvious intention of the testator that the property should remain in the hands of the trustee until the youngest son should arrive at full age, and that the portions of the rents and profits bequeathed to the two minor sons should be applied by the trustee to their support and education. The death of the younger still left a minor son to be supported and educated from the proceeds of the property. We think that, until the surviving minor son shall arrive at full age, the restriction on the power of alienation is valid, and that it is not competent for the guardian to sell the ward's property, under a license from the Common Pleas Court, in violation of this restriction. The nature of the ward's interest in the property, under the will, is such that it cannot be severed without terminating the trust. The trustee must have the control of the entire property to carry out the provisions of the trust. What a Court of Equity would do on the application of the trustee, under the facts stated in the petition, is not involved in this form of proceeding, and we do not wish to be understood as deciding anything on that subject.

The judgment is reversed, with costs, and the cause remanded to said Court, with directions to dismiss the application.

*Simonds v. Simonds*, 3 Met. 558; *McWilliams v. Nisly*, 2 S. & R. 507; *Stewart v. Brady*, 3 Bush. (Ky.) 623; *Hill v. Hill*, 4 Barb. 419; *In re Macleay*, L. R., 20 Eq. 186. *Contra*: A restriction of all power of alienation for even a

single day is void : *Mandlebaum v. McDonell*, 29 Mich. 77. See, also, *DePeyster v. Michael*, 6 N. Y. 467 ; *Anderson v. Cary*, 36 Ohio St. 506. Restrictions as to person : *Den v. Blackwell*, 15 N. J. L. 386. To sell only to specific persons, void : *McCullough's Heirs v. Gilmore*, 11 Pa. St. 370 ; 18 Am. Law Reg. 393.

**Restrictions as to use have also been upheld.**

COWELL *v.* SPRINGS CO.,

Supreme Court of the United States, 1879.

100 U. S. 55.

MR. JUSTICE FIELD. In May, 1873, the plaintiff in the Court below, the Colorado Springs Company, sold and conveyed to the defendant, Cowell, two parcels of land, situated in the town of Colorado Springs, in the then Territory of Colorado. The deed of conveyance stated that the consideration of its execution was \$250, and an agreement between the parties that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor ; and that the grantee in accepting the deed agreed to this condition. The defendant went into possession of the premises under the deed, and soon afterward opened a billiard saloon in a building thereon, which became a place of public resort, where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the condition contained in its deed ; and it recovered judgment. It does not appear that the company had made any previous entry upon the premises or any demand for their possession.

The principal questions, therefore, for our determination are the validity of the condition, and, on its breach, the right of

the plaintiff to maintain the action without previous entry or demand of possession.

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he therefore insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate: they do not destroy or limit its alienable or inheritable character: Sheppard's Touchstone, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.

The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.

A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the grant by the Court of Appeals of New York in *Plumb v. Tubbs*, 41 N. Y. 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended: 14 Kan. 61. See, also, *Doe v. Keeling*, 1 Mau. & Sel. 95, and *Gray v. Blanchard*, 8 Pick. (Mass.) 283.

We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. See, also, *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Cornelius v. Ivins*, 2 Dutch. (N. J.) 376; *Ruch v. Rock Island*, 97 U. S. 693.

The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through mesne conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word "trustee," without mention of any trust upon which he is to hold the property. It is therefore contended that he must be considered as holding it for some undeclared use of the grantor, and that consequently he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negating the inference that the latter retained any interest in the property or ad-

vanced the purchase-money. And besides, if any trust was in fact created, it was for the *cestui que trust*, and no one else, to complain of the action of the patentee and enforce the trust: it did not prevent the legal title from passing by his conveyance: Perry, Trusts, § 334.

In March, 1872, the patentee conveyed the premises to the National Land Improvement Company of El Paso County, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold, and grant real and personal property; explore, locate, and improve lands; transport emigrants and merchandise; construct houses and buildings; manufacture, trade, and traffic; colonize, organize, and form settlements; operate mineral and other lands, and improve and work the same, provided such lands be located in Utah, Arizona, or adjoining States and Territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the Territory of Colorado and to hold and convey real property there. By the law of March 2, 1867, then in force, the Legislatures of the several Territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits: 14 Stat. 426. His position is that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reason of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations



created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold, and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their Legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden.

The National Land and Improvement Company, the day following the receipt of the deed of Lombard, conveyed the premises to the plaintiff, the Colorado Springs Company. This company was incorporated in 1871 for the purpose of aiding, encouraging, and inviting immigration to the Territory, and to purchase, hold, and dispose of lands, town lots, mineral springs, and other property, also to construct and operate ditches, wagon-roads, and railroads, and mills for manufacturing lumber, and generally to do all things authorized by the laws of the Territory which might tend to accomplish the purposes stated. At that time the Legislature was restricted, as already mentioned, in its power to create by general law corporations. It was not empowered to authorize the formation of companies to aid and encourage immigration, and for that purpose to take, possess, and convey real property in the Territory. Therefore the defendant contends that the company could not acquire a right to the premises in controversy. But the answer to this position is, that, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies; therefore the incorporation here was not wholly illegal: a corporate

body competent to exercise some of the powers mentioned was created, and under the statute of the Territory could acquire and hold or convey, by deed or otherwise, any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the State, succeeding that of the Territory, and the corporation, and is no concern of the defendant. It would create great inconveniences and embarrassments if, in actions by corporations to recover the possession of their real property, an investigation was permitted into the necessity of such property for the purposes of their incorporation, and the title made to rest upon the proof of that necessity: *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 552.

But there is another, and general answer to this objection. The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is therefore estopped, when sued by the grantor for the premises, upon breach of this condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it: *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 185; *Miller v. Shackelford*, 4 Dana (Ky.), 287, 288; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161.

Judgment affirmed.

*Plumb v. Tubbs*, 41 N. Y. 442; *O'Brien v. Wetherell*, 14 Kan. 616; *Gray v. Blanchard*, 8 Pick. 284; *Stines v. Dorman*, 25 Ohio St. 580; *Linzee v. Mixer*, 101 Mass. 512; *Warner v. Bennett*, 31 Conn. 468.

**The right of descent, of curtesy and of dower, and liability for debts, are likewise inseparable incidents of a fee simple.**

b

**Descent.**

ESTATE OF DONAHUE,  
Supreme Court of California, 1868.

36 Cal. 329.

SAWYER, C. J. James Donahue died in Santa Clara County on the 17th of August, 1862, leaving a surviving wife, Mary A. Donahue, and four infant children, Peter Donahue, Margaret Donahue, Mary Jane Donahue, and William E. Donahue. He left a will, by which, after making sundry bequests, he devised one-third of all the residue of his estate, real and personal, to his said wife, and the remaining two-thirds to his said children. On the 6th of August, 1864, one of said children, then an infant, William E. Donahue, died in said county, in the sixth year of his age; and on the 1st of April, 1865, another of said children, Mary Jane Donahue, died in the third year of her age. Letters of administration having been duly issued upon the estate of said infant, William E. Donahue, deceased, such proceedings were had that a final decree of distribution of said estate was made, whereby one undivided third part of said estate was distributed to the surviving brother, Peter Donahue, another equal undivided third to the surviving sister, Margaret Donahue, and the remaining third to the heirs-at-law of the deceased sister, Mary Jane Donahue, to the entire exclusion of the said Mary Ann Donahue, mother of the deceased, who claimed to be entitled, as one of the heirs-at-law of the said William E. Donahue, deceased, to an equal distribution or share of said estate with the surviving brother and sisters. The said Mary Ann Donahue excepted to the decree, and she now appeals therefrom.

The only question is as to whether she is entitled to a share as one of the heirs of the deceased infant son, under our statute of descents and distributions.

Section 1 of said statute, as amended in 1862, provides that, where any person having any estate not otherwise limited by marriage contract, shall die intestate, "it shall descend and be distributed, subject to the payment of his or her debts, in the following manner:

"First— . . . Second— . . . Third—If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister, by right of representation; *provided, that, if he or she shall leave a mother, also, she shall take an equal share with the brothers and sisters.*" Stats. 1862, p. 570.

In this case, the intestate, William E. Donahue, was an infant under six years of age, and he left surviving no issue, wife, or father; but he left a brother, two sisters, and a mother. The case, then, is clearly within the category provided for in this subdivision and its proviso, and by its express terms the estate should have been divided in equal shares between the brother, sisters, and mother, unless there is some other provision affecting the question. We find no other provision applicable to the facts or in any way affecting the question, unless it be the seventh subdivision of the same section, which reads as follows:

"Seventh—If any person shall die leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate *that came to the deceased child by inheritance from such deceased parent* shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation:" Stats. 1862, p. 570.

And this provision does not affect the question, unless "the estate came to the deceased child [in this instance the intestate, William E. Donahue] by *inheritance* from such deceased parent." Did the estate *devised* by the will of James Donahue, the father of the intestate, come to the latter by "*inheritance*," within the meaning of the statute? We think not. We have no doubt that the term "inheritance" is used

in the statute in its ordinary, well-known signification. An estate acquired by inheritance is one that has descended to the heir, and been cast upon him by the single operation of law. "Descent or hereditary succession is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir-at-law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance:" 2 Black. Com. 201, and note 1; see, also, 2 Black. Com. 241, 294, 373, 374.

The estate, in this instance, was not cast upon the deceased by operation of law, as the representative and heir of his father, but was conferred upon him by devise. The estate was acquired by *purchase*, in the technical sense of the term, and not by *descent*. It did not come to him by inheritance, and should not, therefore, have been distributed under the *seventh* subdivision of section 1, but under the third, which gives the mother an equal share with the brothers and sisters.

The decree is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

## C

**Curtesy.**

WATSON v. WATSON,  
Supreme Court of Errors, Connecticut, 1839.

13 Conn. 83.

WAITE, J. The object of a disclaimer is to prevent an estate *passing* from the grantor to the grantee. It is a formal mode of expressing the grantee's dissent to the conveyance before the title has become vested in him. In some cases it may be highly proper, as where a deed is made conveying an estate to one for life, with a remainder to another in fee. Here, in the absence of all evidence to the contrary, the law would presume the assent of the grantee in remainder, upon delivery

of the deed to the grantee for life, for the benefit of both. But if the remainderman chooses not to take the estate, he may disclaim, and thereby remove all presumption of assent. So, where a deed is executed to several persons, and delivered to one for the benefit of all, if one dissents he may disclaim and furnish evidence that his share still remains in the grantor: *Treadwell et al. v. Bulkley et al.*, 4 Day, 395.

But if the grantee once assents, and the title thereby becomes vested in him, he cannot, by any disclaimer, revest the estate in the grantor. For if he could, the disclaimer would have the effect of a deed, which it cannot have; the object of the latter being to *transfer* property—of the former to *prevent* a transfer.

But in a case of dissent the heir cannot, by any disclaimer, prevent the estate from passing to him. It vests in him *immediately* upon the death of the ancestor; and no act of his is required to perfect his title. He cannot, by any act, cause the estate to remain in the ancestor; for the latter is incapable of holding it after his death. Nor can he, by a disclaimer, transfer the estate to any other person as the heir of the ancestor; for, as has already been observed, the object of a disclaimer is not to *convey* but to *prevent* a conveyance. He is, therefore, in the same situation, upon the death of the ancestor, as a purchaser who has assented to the conveyance. In both cases a transfer can only be made by some instrument adapted to the conveyance of real estate.

A devisee, however, stands in the same situation as a purchaser. If he dissents the estate passes to the heir in the same manner as if no will had been made. It is entirely optional with him to take or refuse the estate devised: *Townson v. Tickell et al.*, 3 Barn. & Ald. 31.

In the present case the disclaimer was made by one who was entitled to the property as tenant by the curtesy. Is he, in this respect, like a grantee or an heir? This species of estate has sometimes been classed with those acquired by purchase. But it is rather an estate thrown upon the tenant by operation of law: *Co. Litt.* 18 *b*. It partakes more of the character of an estate acquired by descent than by purchase. Immediately

upon the death of the wife the estate vests in him. Like the heir, he cannot, by refusing to take it, cause it to remain in the wife; nor can he, by a disclaimer, transfer it to others. The estate thus vested in him becomes immediately liable for his debts; and he cannot, by any refusal to take the property, defeat the claims of his creditors.

The disclaimer offered in evidence could have no effect in showing a title in the plaintiffs; and was properly rejected by the Court.

We are, therefore, satisfied that no new trial should be granted.

New trial not to be granted.

## d

### **Dower.**

#### BRACKETT *v.* LEIGHTON, Supreme Judicial Court of Maine, 1831.

7 Me. 383.

WESTON, J. If the witness rejected had no interest in the personal estate of the testator, her late husband, she was competent to testify. And this depends upon the true construction of the first clause in the will of the deceased, making provision for her. It is in these words, "it is my will that my beloved wife, Teresa Brackett, shall have, hold, and enjoy her full and reasonable dower in all my estate, according to the laws of this State." Dower is a term well known to the law; and has reference only to real estate. It is also a term of familiar and general use in the community; and we are not aware that it has any popular acceptance, varying from its technical meaning. Indeed dower is an interest so generally known, and so well understood, that there are probably few persons competent to do business, who would be at any loss as to the construction of the term. And we do not feel at liberty to extend its meaning in the will in question. It is possible the

testator might have used it in a larger sense; although whether he did so or not is altogether conjectural. He intended it is said to be generous to his wife; but we have no other evidence of his intentions in this respect, than what appears in this clause in his will. He gives her dower in all his estate, but it was to be according to the laws of the State, which allow it only in lands, tenements, or hereditaments.

After bequeathing \$5 each to the two sons of his former wife, in the third clause of his will, the testator devises and bequeaths all the rest and residue of his estate, real and personal, to his other children. Here the term, personal, is used that his meaning might not be misunderstood, although the word, estate, is a general term, embracing every species of property. Had he used the same terms in the clause providing for his wife, viz., dower in all his real and personal estate, although dower, as applied to the personalty, would have been used in an improper sense, yet it might fairly have been understood to carry a third part of his personal estate. But we find him using it in the third clause, and omitting it in the first. He gives her dower in all his estate, according to the laws of the State. The law gives her dower in all his real estate; and we find nothing in the will which warrants the construction that he intended to give her anything more.

The exceptions are accordingly sustained; and there must be a new trial at the bar of this Court.

e

**A fee simple is liable for the debts of its owner.**

MCCORMICK HARVESTING MACHINE CO. *v.* GATES,  
Supreme Court of Iowa, 1888.

75 Iowa, 343.

SEEVERS, C. J. The plaintiff obtained a judgment against the defendant A. C. Gates, and in this action seeks to subject certain real estate, which said Gates has a title to, or interest



in, to the payment of said judgment. Whatever right or interest A. C. Gates may have in the real estate was derived under the will of E. M. Gates, and it is as follows: "I have placed my son Alvin C. Gates on a farm near Colfax, in said county, described as the southwest quarter and the north half of the southeast quarter of section eleven, township seventy-nine, range twenty-one, situated in said Jasper County, State of Iowa, which it is my will that he occupy and enjoy during his natural life, but without the power or ability to convey or incumber the same, and that its productions and rents are intended by me to insure a support for himself and his family; and it is not my will that he have the power to mortgage or incumber the rents, profits, or productions of said farm, either above or under ground, or that the same be subject to attachment or levy for the debts of said Alvin. It is my will that he have such an estate as will allow of his farming the same himself or renting to others, or as will allow him to mine the coal that is supposed to be under it, or contract with others to mine it, so that nothing is done which will allow the income from the same to escape from the said Alvin or his said family. And it is my will, that upon the decease of said Alvin, the title to said land descend to Glen Gates, daughter of said Alvin, if she is the only child of his then living, or jointly to said Glen and any other child or children that may be born to said Alvin, to share and share alike; and it is my will that if no children of said Alvin are living at the time of his decease, that then and in that case the title in fee simple to vest in my sons, Sumner E. and Lorin A. Gates, and, if they are not living, in their legal representatives." The question to be determined is whether A. C. Gates has such an interest in the land as can be alienated or sold on execution for debts created by him. It is stated in the will that the testator had placed A. C. Gates on the land, and he was to "occupy and enjoy it during his natural life." Conceding that there is no qualifying provision in the will, this is a devise of a life estate: 2 Jarm. Wills (5th Ed.) 404; 2 Washb. Real Prop. (3d Ed.) 450; *Reed v. Reed*, 9 Mass. 372; *Blanchard v. Brooks*, 12 Pick. 63; *Lewis v.*

Palmer, 46 Conn. 460; *Bowman v. Pinkham*, 71 Me. 295. But such devise is coupled with conditions; it being provided that A. C. Gates shall not convey, nor incumber the land or the rents and profits, nor shall the same be subject to attachment or levy for the debts of said A. C. Gates. Counsel for the appellee insist that, as a life estate is vested in A. C. Gates, the provision against the alienation by him or through judicial process is void, because it is inconsistent with the estate vested in him; that is to say, the argument is, if a person is vested with an estate for life or in fee simple of real estate, he must necessarily be vested with the right to alienate such estate, and that such right cannot be in any respect controlled. If the power to alienate is restricted, the estate ceases to be an absolute one, whether it be for life or in fee simple. In this respect there is no difference in the two estates; both are absolute, or neither exists. The authorities, without serious conflict, except as hereafter indicated, are in accord upon this subject, and sustain the views above expressed: 2 Jarm. Wills (5th Ed.) 538; 1 Perry, Trusts, § 386; *Blackstone Bank v. Davis*, 21 Pick. 42; *Deering v. Tucker*, 55 Me. 284; *Keyser's Appeal*, 57 Pa. St. 236; *McCleary v. Ellis*, 54 Iowa, 311. We have doubts whether any adjudged case can be found which holds otherwise, unless the legal title to the property has been vested in a trustee, for the use, under specified conditions, of the beneficiary. Many such cases have been cited by counsel for the appellants, but they are clearly distinguishable, unless it can be said that under the will in question a trust estate was created. But it is too clear for controversy, we think, that a life estate was vested in A. C. Gates. He could not hold such estate in trust for himself. The two estates are inconsistent, and cannot exist in the same person at the same time. In fact, the will does not create a trust estate, but vests an estate for life in A. C. Gates.

The petition states that an execution was issued on the judgment and returned "No property found." This, being admitted by the demurrer, constitutes a sufficient basis for and warrants this proceeding in equity to determine the nature

and extent of the estate of A. C. Gates in the property in controversy. The demurrer was properly overruled, and the judgment of the Court subjecting the life estate to the payment of the judgment must be affirmed.

*Blackstone Bank v. Davis*, 21 Pick. 42.

## 2

### DETERMINABLE FEES.

**"Determinable Fee"** is a generic term, and includes fee-tail, fee upon condition and fee upon limitation, all of which are freehold estates of inheritance, subject to termination upon the happening or not happening of some uncertain event.

#### a

#### Fee-Tail.

**An estate in fee-tail is a freehold estate of inheritance given to a donee and limited either generally or specially to the heirs of his body.**

BUXTON *v.* INHABITANTS OF UXBRIDGE,  
Supreme Judicial Court of Massachusetts, 1845.

10 Met. 87.

HUBBARD, J. The clause in the will of Benjamin Buxton, upon the construction of which the case principally depends, is as follows: "And the other half of my estate, both real and personal, I give and dispose of as followeth, viz. : the one-half of all my lands, except the eight acres given to James, to my son John Buxton and the heirs lawfully begotten of his body, and their heirs and assigns, and all the remainder of my movable estate." It is argued that the words "heirs and assigns" must be construed to have some meaning; and that, by giving them their appropriate signification, they enlarge the gift to a fee, and consequently the demandant has no estate in the demanded premises. But we are of opinion that the words do not enlarge the devise. It is a common rule of construction

that general words are to be limited and restrained by the subject to which they immediately relate, and are not to be construed as conferring a larger or different grant or power than the distinct grant or power created by the specific words. In this case, to give the construction contended for, would be directly to change the nature of the estate specifically created, and to defeat the object of the grant. In cases where a subsequent clause is clearly repugnant to preceding clauses, the clause must be rejected as not expressing the intent of the donor or grantor, and as the only legal mode of carrying into effect imperfect instruments. But in the case now before us, we do not think the clause repugnant, nor that the words were intended to enlarge, or that they do enlarge, the estate previously created; but that the clauses may stand together, and that they intend merely to express the nature of the estate, as one of inheritance beyond the immediate heirs of the first taker, and are but a repetition of the gift. The words "heirs and assigns" are qualified and restrained by the words "heirs of the body," which last show clearly the intention of the testator to create an estate tail; and whether the restraining words succeed or precede the more general words, they operate, in either case, to limit the gift or grant, if the intention is clearly expressed by such restraining words; as in *Soulle v. Gerrard*, Cro. Eliz. 525, where Richard Baker, being seized of land in fee, and having four sons, devised his land to his son Richard and his heirs forever, and if he should die within the age of twenty-one years, or without issue, then to his three other sons. The deviser died, and Richard, the devisee, had issue, a daughter, and died within age; and it was adjudged that he took an estate tail, and that the daughter was entitled to the estate. So in *Clache's Case*, Dyer, 330 b, where a grant to A. and her heirs forever was restrained by the subsequent words, "having no issue." See, also, *Corbin v. Healy*, 20 Pick. 514, where one Marcy executed a deed to his daughter Rhoda. The words were, "unto the said Rhoda, and to her heirs born of her body, to be to her and them forever;" and afterward, in the *habendum*, were the words "to

have and to hold the same to her and her heirs forever." The grantor also covenanted with her, and her heirs as aforesaid, that he would "warrant and defend the same to her and her heirs aforesaid." In that case the Court held that the words in the *habendum* did not enlarge the estate to a fee simple, but that the generality of the word "heirs," in the *habendum*, was limited to those heirs who by law could take that estate, namely, heirs of her body. See, also, Co. Lit. 21 *a*; Perk., §§ 170, 171; Osborne v. Shrieve, 3 Mason, 391.

This disposes also of the second point raised, to wit, that if there was an estate tail in the first taker, the fee vested in the heirs of Timothy, and that his eldest son did not take the estate as tenant in tail, and so the demandant, though an heir and the eldest son of Timothy, would only be entitled to one-tenth part of the estate. Upon the authorities above cited it is clear that the estate was not enlarged in the heir of the tenant in tail, by the subsequent words, and consequently the eldest son of John took an estate tail, and not an estate in fee; and under him the demandant claims as heir in tail.

We are now called upon to consider the construction to be given to the deed of partition between the two brothers, John and James Buxton, made shortly after the death of their father. And the question is, whether the legal effect of this partition was to give John Buxton an estate tail in the whole of the lands set off to him in severalty, and to James Buxton an estate in fee in the portion set off to him; or, admitting that it would not bind the heir of the tenant in tail, if he chose to avoid it after the death of the tenant in tail, yet if he now comes in and affirms the partition, whether he cannot establish it, and thereby entitle himself to claim the whole of the demanded premises.

This partition was not made under any legal process, but was the mere agreement of the parties; and it is very clear, we think, that it could not bind nor affect the heir in tail, though it would be binding on the tenant in tail during his life: Co. Lit. 170 *a*, 173 *b*; Soule v. Soule, 5 Mass. 64. And although such a division of the estate might be a reasonable

and fair one, yet the legal power was wanting to carry into effect their intent in its full extent. The deed itself, however, was not a simple partition during the life of the tenant in tail, because James, who was seized in fee of an undivided half of the estate, by force of the partition deed, conveyed an estate in fee to John and his heirs, in half the premises assigned and transferred to John in said deed, while he, in return, took an estate for life in half the premises released and conveyed to him by John, who had no right or power to pass a larger estate. We are therefore of opinion that, by the deed of John Buxton to Nicholas Batty, an estate in fee passed to him in an undivided half of the premises conveyed to him, and an estate of freehold, during the life of John, in the other undivided half. This deed was made so long ago as January, 1789, but John Buxton not dying till 1839, the right of the heir in tail has not been affected by the lapse of time, although Batty's estate has passed to other persons, under whom the tenants claim.

Whether the heir in tail could have affirmed the partition after the death of the tenant in tail, if he had made no conveyance during his lifetime, we are not called upon to consider, because, after the transfer to Batty, other persons acquired rights in the lands, which could not be affected by any election of the heir in tail to affirm the partition.

With these views, we are of opinion that the demandant has established his title to one-half of the demanded premises; and his remedy, if he has any, for his further interests in the lands devised in tail, must be pursued against the other owners of the entailed estate.

Judgment is to be entered on the verdict for an undivided moiety of the demanded premises.

WILLIAMS, R. P. 35; 4 Kent Comm. 11. A "conditional fee" is the same as a fee-tail: *Wight v. Thayer*, 1 Gray, 284; *Steel v. Cook*, 1 Met. 281. To create a fee-tail the word "body" or other words of like import was necessary: *Baker v. Scott*, 62 Ill. 86. General and special fee-tail: *Butler v. Huestis*, 68 Ill. 594. Incidents to fee-tail: *Boone*, R. P. 31. See further: *Allyn v. Mather*, 9 Conn. 114; *Jewell v. Warner*, 35 N. H. 176; *Redstrake v. Townsend*, 39 N. J. L. 379. Abolished in Minnesota: Minn. Gen. Stats. 1878, ch. 45, §§ 3, 4.

## b

## Estates upon Condition.

**An estate upon condition is a freehold estate "which may be created, enlarged or defeated upon the happening or not happening of some uncertain event."—2 Washb. R. P. 2.**

WARNER *v.* BENNETT,

Supreme Court of Errors, Connecticut, 1863.

31 Conn. 468.

SANFORD, J. In our opinion the conveyance from Tomlinson to Bennett and others was of a fee-simple estate upon condition expressed in the deed. The instrument is a common deed of bargain and sale to the grantees, their heirs and assigns forever, for certain uses specified in the deed, which contains the following clause: "The *conditions* of the within deed are such that whenever the within-named premises shall be converted to any other use than those named within, and the within grantees shall knowingly persist in the use thereof for any purpose whatever except such as are described in said within deed, the said grantees forfeit the right herein conveyed to the within-described premises, upon the grantor paying to the said Hatch and Bennett and other stockholders the appraised value of such buildings as may be thereon standing."

Blackstone says, estates upon condition "are such whose existence depend upon the happening or not happening of some uncertain event whereby the estate may be originally created or enlarged, or finally defeated:" 2 Bla. Com. 151. Littleton says, "it is called an estate upon condition because that the estate of the feoffee is *defeasible* if the condition be not performed:" § 325. "A condition is created by inserting the very word 'condition' or 'on condition' in the agreement:" 1 Bouvier's Inst. 285. Conditions are precedent or subsequent. "Precedent are such as must happen or be performed before the estate can vest or be enlarged. Subsequent are such by the failure or non-performance of which an estate already

vested *may be defeated*:" 2 Bla. Com. 154. In the case of a condition "the estate or thing is given absolutely without limitation, *but the title is subject to be divested* by the happening or not happening of an uncertain event. Where on the contrary the thing or estate is granted or given until an event shall have arrived, and not generally with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation:" 2 Bouvier's Inst. 275; 2 Bla. Com. 155.

In the case before us the estate vested in the grantees upon the delivery of the deed, to have and to hold to them, their heirs and assigns, not *until* they should convert the property to other uses than those specified in the deed, nor *so long as* they should continue to use it for the purposes specified, but forever; with a proviso or condition expressed in the deed, that if they should convert the property to other uses they should *forfeit* their estate. The words employed are most appropriate and apt to make an express condition in deed. They are "*the conditions of the within deed are such,*" etc. And in Mary Portington's Case, 10 Coke, 41 *a*, it is said that "*express words of condition shall not be taken for a limitation.*" It has indeed been held that they may be so taken where the estate is limited over to a third person upon the breach or non-performance of the condition (Lady Anne Fry's Case, 1 Inst. 202), but there is no such limitation over in the case before us. So when it is said that "whenever the within-named premises shall be converted to any other use," etc., "the grantees *forfeit* the right herein conveyed," it is clearly indicated that the estate thus forfeited by the misappropriation is to be cut off before the time originally contemplated for its termination by the parties.

But it is said that by the terms of the instrument the forfeiture depends not merely upon the misappropriation of the property by the grantees, but also upon the grantor's payment of the appraised value of the building. Suppose it is so, how can that affect the question whether this is a condition in deed or a limitation? No matter how many events the forfeiture



depends upon, nor how many individuals must act in producing them, when all those events concur and co-exist the forfeiture is effected as completely as if it depended upon the occurrence of a single event, and the action or omission of a single individual. But the payment for the building was not an event upon which the forfeiture depended. It was merely a duty imposed upon the grantor by the contract in addition to that which the law imposed, to enable him to take advantage of the breach of condition and enforce the forfeiture. His legal obligation to enter for breach of the condition was in no wise affected by it. The estate conveyed by the deed was not an easement, or any other right or interest in the property less than a fee simple. The fact that the instrument was signed by both of the parties to it is of no importance. They were neither more nor less bound by the stipulations and conditions contained therein by reason of such signature. The instrument contains no contract on the part of the grantor to pay for the building. The provision upon that subject operates as a qualification of the grantor's right to enforce the forfeiture and regain his property, but operates in no other way. But for that provision the estate granted could have been put an end to, and revested in the grantor, by an entry only; under that provision an entry could be made *available* only by payment for the building also.

We think it clear that the estate of the grantees was an estate on condition in deed, and that it was an estate upon condition subsequent; and hence, notwithstanding a breach of the condition by reason of which the estate might have been defeated, it must continue to exist in the grantees, with all its original qualities and incidents, until the grantor or his heirs by an entry (or its equivalent, a continual claim) have manifested in the way required by law, their determination to take advantage of the breach of condition, to avail themselves of their legal rights, and to reclaim the estate thus forfeited.

The law upon this point is thus laid down by Professor Washburn, in the first volume of his treatise on real property, page 450, with accuracy and precision: "A condition, how-

ever, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and until that is done it loses none of its original qualities or incidents." See also *Ib.* 452; 2 *Bla. Com.* 155; 2 *Cruise Dig.* 42.

But there is in this bill no allegation that an entry for condition broken was ever made. No right to maintain this suit is disclosed, no title to the property is set up, nothing is claimed but a right of entry for condition broken. And for this reason, if for no other, the bill is insufficient, and the decree must be pronounced erroneous.

The allegation in relation to an abandonment of the property is immaterial. It is not averred that the grantees had abandoned the property, but only that they had abandoned it "so far as the uses named in said deed are concerned;" that is, that they had ceased to use the property for the purposes for which the grant was made, not that they had ceased to use it altogether. What effect an absolute and entire abandonment of the property by the grantees would have had upon the legal or equitable rights of this petitioner, we are not now called upon to decide.

Secondly. A right of entry for condition broken is not assignable at common law, and we have no statute which makes it so: 2 *Cruise Dig.* 4; 4 *Ib.* 113; 1 *Spence Eq.* 153; 1 *Swift Dig.* 93. The grantor or his heirs only can enter for breach of such condition: 1 *Washb. on Real Prop.* 451; 2 *Cruise Dig.* 44. The petitioner therefore could have obtained no right or title to make an entry for breach of the condition, and without such entry the estate of the grantees could not be terminated, and no suit at law or in equity could be maintained against the occupant of the property.

Thirdly. If there was a breach of the condition and a forfeiture of the grantees' estate in consequence, and if a right of entry could be and was in fact assigned to the petitioner, still the petitioner could not obtain the relief for which he seeks in a Court of Equity, because that Court never lends its aid to

enforce a forfeiture: 4 Kent Com. 130; 2 Story Eq. Jur., § 1319; *Livingston v. Tompkins*, 4 Johns. Ch. 415.

Lastly. If the right, title, or interest, whatever it was, of the grantor or his heirs was assignable, and was assigned to and vested in the petitioner, as he claims, he had no occasion to come into a Court of Equity for relief. We do not see why he might not have entered for breach of the conditions, requested the respondent to unite with him in procuring an appraisal of the building, if he refused procured such appraisal without the respondent's co-operation, tendered the amount of the appraisal, and brought his action of ejectment. The petitioner's legal right, if he had it, to put an end to the grantee's estate and obtain possession of the property, we think could not have been defeated by the respondent's refusal to co-operate in the appraisal or accept the tender. See 1 Swift Dig. 295; *Powell on Cont.* 417; *Whitney v. Brooklyn*, 2 Conn. 406. We know of no power in a Court of Equity to compel the respondent to join the petitioner in procuring an appraisal, nor to make one, in such a case as this; and we see no occasion for the exercise of such a power if it exists. We think the petitioner has an adequate remedy for the enforcement and protection of all his rights at law.

There is manifest error in this record.

4 Kent Comm. 9; 2 Devlin on Deeds, 974; *Osgood v. Abbott*, 58 Maine, 73; *Southard v. Central Ry. Co.*, 26 N. J. L. 1; *Bowen v. Bowen*, 18 Conn. 535; *Hooper v. Cummings*, 45 Maine, 359; *Delhi School District v. Everett*, 52 Mich. 314; *State v. Brown*, 27 N. J. L. 13, 20; *Cook v. Bisbee*, 18 Pick. 527; *Arms v. Burt*, 1 Vt. 303; *McKelway v. Seymour*, 29 N. J. L. 321, 329. Only the grantor or his heirs can take advantage of the condition broken: *Southard v. Central Ry. Co.*, 26 N. J. L. 1.

## C

**Estates upon Limitation.**

**An estate upon limitation is a freehold estate of inheritance "liable to be terminated *ipso facto* by the happening of the event by which the limitation is measured."**—1 Washb. R. P. 94.

HENDERSON *v.* HUNTER,  
Supreme Court of Pennsylvania, 1868.  
59 Pa. St. 335.

Where land is conveyed to the grantees for church purposes, "so long as they use it for that purpose and no longer, and then to revert to the original owner," an estate upon limitation is created in the grantees with a conditional limitation in the grantor.

AGNEW, J. This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867. The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession, there is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitations of the use itself.

It is for the erection of "a house or place of worship for the use of the members of the Methodist Episcopal Church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline which, from time to time, may be agreed upon and adopted by the ministers and preachers of the said church at their General Conference in the United States of America." This is the main purpose of the trust, the other portions of the deed relating to the use being ancillary only to this principal object. The interjected words, "so long as they use it for that purpose and no longer, and then to return back to the original owner," are terms of undoubted limitation, and not of condition. They accompany

the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure.

The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed, and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation, and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or determinate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of a condition to be annexed.

"A special limitation," says Mr. Smith, in his work on Executory Interests, p. 12, "is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry, or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the words "until," "so long," "if," "whilst" and "during," as when land is granted to one *so long* as he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents he shall have made £500: 2 Black. Com. 155; Smith on Exec. Int. 12; Thomas Coke, 2 vol., 120-21; Fearne on Rem. 12, 13 and note p. 10. "In such case," says Blackstone, "the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy."

The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion *ipso facto* returned to Thomas Pillow, the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property, and consequently their right to maintain this action,

hinged upon this event. Then, as the use of the members of this church was to be according to the rules and discipline from time to time adopted by the General Conference, it became a question whether the alleged abandonment of the house as a place of worship was by church authority, and according to the rules and discipline then existing ; for a mere temporary suspension of services there, or a discontinuance of the use without authority, would not, *ipso facto*, determine the use. Hence an inquiry both into the fact of abandonment and the authority of the church became essential.

According to the constitution and discipline of the Methodist Episcopal Church of the United States, its preachers, denominated deacons and elders, are not called by the societies to which they preach, but are appointed to stations, and to travel in circuits, by the presiding bishop of the annual conference. The power is lodged in him, but from a practical necessity he acts with the advice of his council of presiding elders assembled at the annual conference. The government of the church is clerical and not lay. It has no admixture of the laity, excepting in the quarterly conference of the circuit or station, in which certain lay official members are admitted to seats *ex necessitate rei*. The annual conferences are composed of the deacons and elders in the traveling ministry within the respective conferences, presided over by a bishop or superintendent, as originally termed, assigned to hold the conference by the board of bishops. The general conference consists of delegates, elected by all the annual conferences from among the traveling preachers, presided over by the bishops in turn, and holding its sessions quadriennially.

The annual conferences are divided into districts, composed of the circuits and stations within their respective boundaries. Over each district the bishop, at the annual conference, appoints an elder to preside, who travels his district four times a year, and presides at the quarterly conferences in each circuit or station, composed of the traveling and local preachers, exhorters, stewards, class leaders, trustees, and first male superintendent of Sunday-schools. A station has a single place of

stated public service, while a circuit has several. It is to these circuits and stations the traveling preachers are assigned at every annual conference. In his circuit or station the preacher in charge arranges or "plans" the appointments of service during the term of his own appointment. In planning the circuit he *may* take the advice of the stewards, if he choose to ask it; and in arranging the appointments for service it is his duty to give the local preachers within his charge regular and systematic employment on the Sabbath.

No specific directions are found in the discipline as to the arrangement of the appointments, and the whole subject seems in a great measure committed to the sound discretion of the traveling preacher in charge, subject only to the discipline duty of preaching where there is the greatest number of quiet, willing hearers, the most fruit, and where the Spirit most abounds; and subject to the superintending control of the presiding elder, whose duty it is to oversee the spiritual and temporal business of the church; to take charge of all elders and deacons in his district, and to take care that the discipline shall be enforced in his district.

As to the particular building or house in which services shall be statedly held, there is nothing definite in the discipline, and the authority over it seems to be only inferential, arising out of the power of the preacher in charge to arrange the appointments of service, which must include places as well as times of appointment. This vagueness probably flows from the fact that at just this point the boundary of church polity interlocks with the lines of popular support, for money and members must come from the laity. Still church polity reserves a large share of control over church property, as will be seen in the chapter on this subject; with a sorrowful recognition, however, of its dependence, for plainness and economy in the building of churches is enjoined, lest the necessity of raising money make *rich* men necessary to the church, and if so (says the discipline), "we must be dependent on them, yea, governed by them, and then farewell to Methodist discipline, if not doctrine, too."

In order to preserve control, however, it is made the duty of the quarterly conferences to secure the ground on which churches are to be built according to the deed of settlement, and to admit no charter or deed that does not secure the rights of the preachers of the church in the ministration of its services according to the true meaning of the deed of settlement, the form of which is prescribed.

Thus the effect of this active control of the clerical authorities of the church over preachers, preaching, and church property, is to take from the society at large, or laity, the power of continuing any building as a place of worship according to the rules and discipline of this church, after the ecclesiastical authority has resolved to discontinue the services of its preachers there. The society might choose to worship there of their own head, and call a preacher of their choice who was willing to come without the authority of his church, but in doing so they would cut them themselves off from their church connection, and would be worshipping there no longer as members of this church under its rules and discipline; for to worship as members and under the discipline they must accept the traveling preacher sent to them by the bishop. Consequently, the trust in this case ceased when the proper church authorities, acting under and according to the rules and discipline, totally abandoned the building as a place of worship for the members of this church.

The fact of such an abandonment was submitted by the Judge and found by the jury. In his charge the learned Judge submitted the question on the testimony of the presiding elder and the book of discipline as to the authority for so doing; and on his testimony and that of others as to the actual discontinuance of services there, and the causes thereof. This was all he could do, as the question of fact belonged to the jury.

The reverend gentleman had testified that the church had been abandoned by the conference in March, 1867, and that this action having been taken by the bishop and his council of presiding elders, and the preaching removed to the school-



house in the village, any preaching in this building after the conference, was without the sanction or authority of the church.

I must say I have not discovered in the discipline the precise ground of the bishop's authority to do this; yet it may be a proper understanding of his authority as gathered from the entire body of church law, and the rule in the civil Court is that the churches are left to speak for themselves in matters of discipline and doctrine: *German Reformed Church v. Commonwealth*, 3 Barr, 282. But however the fact may be, where the precise power is lodged, certain it is in this case this proof was made, and with it the fact that the abandonment of the building had also the express sanction of the presiding elder, and inferentially the sanction of the preacher in charge.

We cannot say, therefore, that the fact of abandonment was submitted without sufficient evidence. The fact being found by the jury, these plaintiffs—at the time of the removal of the building—were no longer trustees of the property by the very terms of the limitation in the deed, and had no ownership or estate to enable them to maintain this action.

This is sufficient for the purposes of this case. But it is also insisted that these trustees were superseded by the election of new trustees by the quarterly conference under a new rule adopted by the General Conference of 1864. We shall express no opinion on this point, the interest depending on the form of the deeds made previous to 1864, being too important to be determined upon a meagre presentation of the case to us. It is proper, however, to suggest to the church authorities that this is perhaps perilous ground to stand upon. The church may provide a new mode for the election of trustees, and make their deeds hereafter conform to this mode. But when it comes to the right to supplant trustees established by contract, or to fill vacancies in a mode differing from the terms of the contract, which are the laws of the trust, a new question arises.

A deed is a contract *inter partes*, the grantor on one side and

the trustees on the other, and even the Legislature cannot impair the contract. If conflicts should arise between the trustees nominated or provided for in the deed and those appointed by the quarterly conferences, it may be found difficult to overthrow the will of the grantor or first party in the deed expressed in this contract form.

Judgment affirmed.

d

**When a condition subsequent is followed by a limitation over in case of a breach of the condition, it becomes a conditional limitation.**

STEARNS *v.* GODFREY,

Supreme Judicial Court of Maine, 1839.

16 Me. 158.

WESTON, C. J. Until March 25, 1786, the title to the land in controversy was in the Commonwealth of Massachusetts. On that day, it was included in a large tract granted and conveyed, by a committee in behalf of the Commonwealth, to John Brewer and Simeon Fowler, and certain settlers on the tract, mentioned by name as grantees in the deed, among whom are Hannah Ary, widow, and Solomon Sweat. The deed contained the following clause in respect to these settlers, "on condition that each of the grantees aforesaid pay to John Brewer and Simeon Fowler, five pounds in lawful money, within one year from this time, with interest till paid." Taking the deed together, we must regard it as conveying to each of the settlers named, one hundred acres of the land, subject to be defeated upon the non-performance of the foregoing condition, within the year. Generally an entry of the grantor or his heirs is necessary to defeat an estate thus granted, upon condition subsequent; and the estate could not be divested by the entry of a stranger. But the deed contained a further clause, which is in these words, "provided nevertheless, if any settler, or other grantee aforesaid, shall neglect to pay his proportion of the sum or sums aforesaid, to be by him paid, in order to entitle him to

one hundred acres as aforesaid, in that case the said John Brewer and Simeon Fowler shall be entitled to hold the same in fee, which such negligent person might have held, by complying with the condition aforesaid on his part."

It is a rule of law, that if a condition subsequent is followed by a limitation over, in case the condition is not fulfilled, or there is a breach of it, that is termed a conditional limitation: 2 Black. 155; 4 Kent, 121; *Pells v. Brown*, Croke James, 590. This limitation takes effect without entry or claim, and no act is necessary to vest the estate in the party to whom it is limited. The land then was conveyed to the settlers named, with a conditional limitation over to Brewer and Fowler, if they or either of them, failed to fulfill the condition, within the time appointed. There was a failure on the part of the settlers; whereupon at the end of the year, in March, 1787, the fee of the land in question vested in Brewer and Fowler. The settlers having petitioned the Legislature to interfere in their behalf, a resolve was passed on the 24th of February, 1791, proposing, that if Brewer and Fowler would quiet the settlers for a less sum than they were originally to receive, the difference should be made up by the Commonwealth. The rights of Brewer and Fowler were recognized in that resolve which, having become vested, were out of the reach of legislative control. The settlers were treated with indulgence, both by the Commonwealth and by Brewer and Fowler, who discovered no unwillingness to accede to the proposition made to them.

On the 20th of December, 1794, one Ames and his wife, the same who had been the widow Ary, conveyed their title to the Ary lot to Nathaniel Gould, the elder. Although the legal title to the land was in Brewer and Fowler; yet as they were willing to release their right to the settlers, upon the payment of a small sum, the beneficial interest was regarded as in the latter. It does not appear that Gould resisted or denied the title of Brewer and Fowler, while it remained in them, and the jury have found, that they were not disseised by Gould.

In consequence of the mistake of Nathaniel Dummer, who acted under the resolve of March 1, 1799, Gould's lot was as-

signed to Solomon Sweat, and Sweat's lot to Gould. In February, 1804, they both accepted from Brewer and Fowler deeds of each other's lots, having paid to them the sums stipulated. Whether Dummer had authority thus to locate to each his lot, or whether what he did was binding upon them, if they had refused to acquiesce, it is not necessary to decide, as the parties concerned were satisfied to abide by the arrangement.

Up to this period there is nothing in the case, except perhaps the mortgage to Neal, tending to show that Gould claimed adversely to Brewer and Fowler, but that he held in subordination to their title. He witnessed the deed of his lot to Sweat, of the contents of which he could not be supposed to be ignorant, as he himself received a deed of Sweat's lot. They must have been given at their instance, and upon payment of money. Gould set up no adverse seisin, and interposed no objection, so that as far as he was concerned, there was nothing to prevent the operation of the deed to Sweat. As he still occupied the land, he must be considered as holding as Sweat's tenant at will, and subject to the duties of that relation. It is true he violated those duties, by a conveyance of the land in fee to Neal, in July, 1806. This, at the election of Sweat, might have been treated as a disseisin. But Gould remained in as before, recognizing Sweat's title; for in 1810, he requested him to convey to John Wilkins, he himself conveying the land, of which he had taken a deed to Sweat. From July, 1806, Gould, the elder, may have professed to Neal and his agent, that he held under him; and as between them, Gould was Neal's tenant at will; but he previously stood in the same relation to Sweat, who had prior claims to his fidelity as tenant. Unless Sweat elected to consider himself disseised, for the sake of his remedy, he had a right still to treat Gould as his tenant. In the conflict of duties, which Gould assumed, he was doubtless playing a double game for his own purposes; and there is much reason to believe that his object was to defraud Neal. But there is no evidence that the tenant had any notice of it, or that it is in any degree imputable to him. He is entitled to stand upon his rights; and if by the rules of law, the title

is in him, it must be so adjudged. If the title of Neal is not to be traced back to a period anterior to July, 1806, the seisin and the fee were then in Sweat. He could not be disseised by his own tenant, Gould, except at his election: *Blunden v. Bangle*, Cro. Charles, 302. If there was no disseisin, the tenant has connected himself with Sweat's title, and must prevail.

It may be insisted, that Neal's title commenced when the mortgage deed was executed to him by Gould, in 1797, and that he then succeeded to Gould's seisin. If so, Gould could do nothing in 1804 or subsequently to impair Neal's right. It is not improbable, that the justice of the case, in some of its aspects, might be best promoted by sustaining these positions, if they were in accordance with the facts. The fraudulent practices of the elder Gould would thereby be defeated, and the heirs and assigns of Neal would enjoy the fruits of his purchase. But the rights of other persons, not consensant of the fraud, if any existed, have intervened; and if it has appeared that Neal has waived an advantage he might have retained, his heirs and assigns must abide the consequences. In July, 1806, he cancelled his mortgage, and took a new conveyance from Gould. The mortgage having been discharged, no rights can be predicated upon it, or deduced from it. Intervening incumbrances or attachments, if any had existed, would thereby have been let in. Neal could not have set up prior rights, arising from the cancelled mortgage. We cannot regard it as having any more effect upon the cause than if it had never existed. If Neal would have preserved his title under the mortgage, he should have refused to discharge it without payment, and declined the arrangement proposed by Gould.

As the lot in question vested in Brewer and Fowler, in March, 1787, the instruction first requested was properly withheld, as were also the second and third, the jury having negatived the facts upon which they were based. The jury were instructed that the title did not pass to the widow Ary by the deed to Brewer, Fowler, and others, but as it passed to Brewer and Fowler, at the end of a year, viz., in March, 1787, by a conditional limitation, the legal effect was the same as if it had

never vested in the widow Ary, so that the tenants were not unfavorably affected by this instruction. The other instructions given to the jury were substantially correct.

Judgment on the verdict.

4 Kent Comm. 9; Tiedeman, R. P. 281; Boone, R. P. 214; 2 Devlin on Deeds, 974; Fifty Associates *v.* Howland, 11 Met. 99; Owen *v.* Field, 102 Mass. 90; Proprietors *v.* Grant, 3 Gray, 142; Miller *v.* Levi, 44 N. Y. 489. A stranger may take advantage of a limitation: Owen *v.* Field, *supra*.

## E

### Created by Will.

**Estates upon condition and limitation may be created by will.**

WHEELER *v.* WALKER,

Supreme Court of Errors, Connecticut, 1817.

2 Conn. 196.

HOSMER, J. It is difficult to conceive a case more free from controversy than this, whether we regard the manifest intention of the testator, or the uniformity of precedent.

The devisor, after having made certain devises, gives to his sons, David and Nathan, "all the rest and residue of his estate, real and personal, they paying to his two daughters, Patience Wheeler and Ann Wheeler, each \$300, within one year after his decease." The money was not paid. The plaintiffs enter for non-payment; and bring ejectment to recover the possession.

It was argued for the defendant that the sum bequeathed was a mere legacy, or trust, to be enforced in chancery only. To this the reply made is conclusive, that it is more than a legacy or trust; it is a devise on condition, by the non-performance of which, the plaintiff Ann, one of the heirs of the devisor, has right of entry on the land devised.

An estate on condition expressed in the grant or devise itself, is, where the estate granted has a qualification annexed, whereby the estate shall commence, be enlarged, or defeated, upon performance or breach of such qualification or condition: 2 Black. Comm. 154; Co. Litt. 201. Estates on condition sub-

sequent are defeasible, if the condition be not *strictly* performed : 2 Black. Comm. 154.

The words which constitute a condition may be various. "In particular words there is no magic;" their operation depends on the sense which they carry: 1 Ves. 147. What, in this case, was the intention of the devisor is the decisive question. Was it his purpose to invest his sons with an estate defeasible on a condition which would effectually coerce the payment of the money bequeathed to his daughters; or did he intend to leave them destitute of *legal remedy* to vindicate their undoubted rights? A construction of the devise, according to the usual signification of language, and duly regarding the subject-matter and the consequences will leave no doubt on the mind.

Land granted to a person *on condition*, or *provided always*, or *if it shall so happen*, or *so that* he pay to another a specific sum, within a specified time, vests in him a conditional estate; and if he does not punctually make payment of the money, his estate has become voidable by entry: Co. Litt. 203 *a*. From the case of *Crickmere v. Paterson*, adjudged in the 30th<sup>th</sup> of Elizabeth, Co. Litt. 236, *b.*, Cro. Eliz. 146, it appears, that the words *to pay*, in a will have been considered as constituting a condition. That case was this: A man seised of certain lands, holden in socage, had issue two daughters A. and B., and devised all his lands to A. and her heirs, *to pay* unto B. a certain sum of money at a certain day and place. The money was not paid; and it was adjudged that these words, "*to pay*," etc., did amount in a will to a condition; and the reason was, for that the land was devised to A. for that purpose; otherwise B., to whom the money was appointed to be paid *would be remediless*; and the lessee of B., upon an actual ejectment, recovered the moiety of the land against A. The words, *to pay*, in the preceding case, are precisely equivalent to the word *paying* in the one before the Court. In *Boraston's Case*, 3 Co. 21; *Mary Portington's Case*, 10 Co. 41; *Wellock v. Hammond*, Cro. Eliz. 204, and *Fox v. Carlyne*, Cro. Eliz. 454, the word *paying*, in a will, was considered as creating a condition, or limitation, as should best effectuate the intent of the testator. In the case of *Crickmere*

*v. Paterson*, the words "*to pay*," etc., were decided to import *a condition*, and this construction gave a sufficient remedy. But, in *Wellock v. Hammond*, the expression, "paying forty shillings to each of his brothers and sisters" was adjudged a limitation; for if it were considered *a condition*, there was, in that case, no remedy for the money. And in *Mary Portington's Case*, it is said, "this word *paying*, shall amount to a limitation in a will by construction, because in law it is not any word, either of condition, or limitation; and, therefore, in a will, it shall serve, *as well for the one, as for the other, to supply the intent of the devisor.*"

The meaning of the expression, in *Crickmere's Case*, "otherwise B., to whom the money was appointed to be paid, would be remediless," has been quite misconceived. The idea communicated, undoubtedly, is this, that *under the devise* there was no other *legal remedy*. It is of no avail in this construction of the devise that chancery may give redress, or that the devisee has engaged to make payment. The Court neither refer to the remedy which a Court of Equity may impart, nor to any future possibilities: for the exposition given is a sufficient reason that *the law* gave no other redress by virtue of the devise, for the coercion of payment, than by construing the words to import *a condition*. This effectuated the intent of the testator. The same observations are equally applicable to the case before the Court. To expound the devise, as bequeathing a legacy, or subjecting the devisees to a trust, deprives the daughters of all *redress at law*; and this is a decisive reason for considering the words as importing a condition.

To enter at greater length into a consideration of the question, whether the devise creates a condition or limitation can be of no importance. On either exposition, the remedy of the plaintiffs is the same. It is, however, very apparent that to consider the words as importing a condition is all that is requisite to secure the rights of the plaintiffs under the devise; and this, decisively, settles the construction.

Judgment to be given for the plaintiffs.



## B

## FREEHOLD ESTATES NOT OF INHERITANCE.

**A life estate is a freehold estate, not of inheritance, which is to continue for the life or lives of some particular person or persons, or until the happening or not happening of some uncertain event.**

## 1

## CONVENTIONAL LIFE ESTATES.

## a

**Created by Deed.**

**A life estate may be created by the express words of the parties.**

RICHARDSON *v.* YORK,

Supreme Judicial Court of Maine, 1837.

14 Me. 216.

Isaac York conveyed lands to his son Joseph with the following reservation in the deed: "Reserving to myself the use and control of the above-described lands during my natural life." Joseph York afterward sold the lands to the plaintiff, and Isaac York remaining in possession cut a large quantity of timber and was taking it to the banks of the Saco River, intending to appropriate the proceeds to his own support, when the plaintiff replevied the timber on the ground that the life-tenant had no interest or title to the timber.

EMERY, J. The great question in this case is whether the logs replevied are the property of the plaintiff, so as to draw to him the right of maintaining the action. For it is certain, he could not rightfully have entered to cut them himself without the assent of Isaac York, one of the defendants.

In the language of HEATH, J., in *Attersoll v. Stevens*, 1 Taunt. 183, at p. 198, it is stated, as common learning, that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease, by whomsoever it may be committed. If a general or a partial permission be given to the lessee in the instrument creating the estate, to commit waste, he is so far a tenant with-

out impeachment of waste. Such a permission vests the property of what is the subject of waste, in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals.

From the statement of facts we learn that the land conveyed by Isaac York to Joseph York, on which the trees were cut, consisted of about thirty-five acres, from fifteen to twenty acres of which is partially wooded, the residue consists of mowing and pasture, about five acres of that mowing is interval, and of a good quality; and the income of the land is insufficient for the support of said Isaac; and that said Isaac has not sufficient income from every source for his comfortable support; that he intended to apply the proceeds of the sale of the logs to his own support, and that if so applied, it would not have been more than a comfortable provision thereunto; that the house occupied by said Isaac was, and is, greatly out of repair, as well as the fences; that the said Isaac is very poor, nearly eighty years of age, and very decrepit.

In no part of the statement of facts, or in the deeds, is it made known whether this was an arrangement made by father and son for the support and maintenance of the father, though it is strongly to be suspected.

The deed of Isaac York, dated the 14th October, 1831, conveys to Joseph York "the northwest half of the homestead farm, whereon I now live, reserving to myself the use and control of the above-described lands, during my natural life." The deed of Joseph York to the plaintiff, dated 24th November, 1834, for \$175, sells and conveys to him all the pine trees and hemlock trees standing, growing, and being on the northwest half of the homestead farm on which Isaac York, now of Standish, in the county of Cumberland, lives, with license to go on and cut and carry away the same; the said northwest half, being the same land described in a deed of Isaac York to Joseph York, dated October 14, 1831, reserving so much of said trees and timber for the benefit of Isaac York, who has a life estate in the premises, as shall be necessary, convenient, and indispensable to the enjoyment of the premises aforesaid

during his lifetime, the quantity reserved and to be left as aforesaid, to be ascertained and designated by Isaac Spring.

In Paget's Case, 5 Coke's Rep. 77, it was resolved that when trees are cut down by tenant for life, the property thereof belongeth to him in remainder in fee.

Afterward, and contrary to the adjudication in Herlakenden's Case, 4 Coke's Rep. 62, it was adjudged by all the Judges in the King's Bench, 11 Coke's Rep. 79, in Lewis Bowles' Case, which was trover and conversion, that the lessee without impeachment of waste shall have trees which he cuts, for without impeachment of waste, is as much as without demand for waste done; otherwise, it is, if it be without impeachment, etc., by writ of waste. It was also resolved, that if trees are blown down with the wind, the lessee, without impeachment of waste, shall have them.

After this determination, it was a necessary consequence, that in general, unless on particular circumstances, the lessee for life, without impeachment of waste, was not to be restrained in equity.

But it is said that the clause was never extended to allow the destruction of the estate itself, and would not give leave to fell or cut down trees ornamental or sheltering of a house, much less to destroy or demolish a house: *Packington v. Packington*, 3 Atk. 215. In that case the Lord Chancellor declared that the Courts of Equity had in this respect established rules much more restrictive than those of the common law, which gave tenant for life without impeachment of waste, as large a power over the timber, as tenant in fee simple, that timber might be had for public use: 7 Bac. Abr. Waste, 289. It was malicious, extravagant, humorous waste which the Courts of Equity would restrain.

The parties here have disregarded the provision of our own statute, passed February 28, 1821, ch. 34, which provides, "that any person seized of a freehold estate, or of a remainder or reversion in fee simple or fee tail in a lot of woodland or timberland in this State, whereon the trees shall have come to an age and growth fit to be cut, may petition to this Court to

have them felled and sold, and the proceeds invested for the use of those interested in such woodlands."

It is not to be questioned, that conformably to the strict construction adopted in Massachusetts, that for a tenant in dower to cut timber for sale would be waste, and produce a forfeiture of the place wasted. And so in this State.

But upon the deeds and facts agreed is the defendant, Isaac York, to be subjected to the unmitigated consequences of his acts, as if he was a mere tenant for life without any excuse.

Almost the whole of the cases have arisen under leases, or devises, etc. Here he was original owner, conveying the land in fee, reserving to himself the use and control of the lands during his natural life. It may well be doubted whether this alone would protect him, though the terms are very broad. But though the second deed, under which the plaintiff claims, as purchaser of the trees, might seem to extend to defendant a greater latitude, yet the terms use and control of the land, do not necessarily include destruction of the timber.

In *Davis v. Uphill*, 1 Swanston, 129, an estate had been limited to Ann Uphill for life, remainder to her children, by her deceased husband, as she should appoint; in default of that appointment, to the children in common. They agreed with her, that on her joining in a recovery, the first use should be to her for life, without impeachment of waste. Some difficulty occurred in the conveyance. She commenced cutting, and an injunction was obtained. But the Court refused to continue it to restrain her from cutting timber, unless security was given to her for the full value of all she might cut in her lifetime. This was in 1818.

The expressions in the deed of Joseph York to the plaintiff, reserving so much of said trees and timber for the benefit of Isaac York as shall be necessary, convenient, and indispensable to the enjoyment of the premises during his natural life, might possibly have misled the defendants to a supposition that they were equivalent to the expressions without impeachment of waste. But besides this, they may have supposed that the plaintiff has no exclusive property in the trees and

timber, till what should be left was ascertained and designated by Isaac Spring.

It does not appear but what the trees cut were of suitable growth, and fit to be cut. See 8 Term Rep. 145, *Martin v. Knowlys*. It is not stated that they were intended to be applied to the repairs of the fences or buildings, but the poverty and age of the defendant shows that the supply would be *convenient*, if not necessary for his enjoyment of the premises.

In Virginia it is held by ROANE, J., *Findley v. Smith*, 6 Munf. 134, that in considering waste in this country, the common law, by which it is regulated, adapts itself in this, as in other cases, to the varied situations and circumstances of the country. That cannot be waste, for example, in an entire woodland country, which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land, nor cultivate it without felling the timber. A clearing of the land in such circumstances, would not be a lasting damage to the inheritance, nor a disherison of him in remainder, which is the true definition of waste. Here the widow is not dowable of wild lands, and so is not put in temptation to fell the trees.

In the case under consideration, it is not among the facts agreed that what was done was to the prejudice of the plaintiff's inheritance. *The whole is left on the allegation of a cutting of pine and hemlock timber.*

We must gather the intention of the parties from their deeds, as well as we can on the words in the deed. And though we may conjecture that the grantor, Isaac, intended not to be limited by the terms *use and control* to anything but the employment of the property during his life as he did before; and though this conjecture is strengthened by Joseph's explanation or enlargement in the deed to the plaintiff, and though it does not appear, but there is sufficiency of such timber left for the remainderman, yet upon the facts agreed the plaintiff, according to the rules of law, *upon the severance by the defendants of the pine and hemlock timber from the freehold, became the owner of it.* We may lament the carelessness with

which parties have instruments drawn relating to the relative rights of tenant for life and persons in reversion or remainder. But in this case, in the opinion of the Court, the defendant, Isaac York, by his reservation, remained liable to impeachment of waste, and therefore the defendant must be defaulted.

**A deed of land for an indefinite period, as, "so long as the salt-works there intended to be erected shall continue to be used," conveys a life estate to the grantee.**

HURD *v.* CUSHING,

Supreme Judicial Court of Massachusetts, 1828.

7 Pick. 169.

WILDE, J. The demandant's title, as appears by the facts agreed, is derived from one Thomas Cushing, and through him from David Thacher and Isaiah Smalley, three undivided fourth parts being derived from Thacher, and the remaining fourth part from Smalley. And as the titles of Thacher and Smalley depend on different principles, they will be considered separately.

It appears that on the 28th of December, 1807, an agreement was made between Thacher and Smalley respecting the erection and use of certain salt-works, then contemplated to be built, and which are now standing on the demanded premises. By the terms of this agreement Thacher was to furnish the materials for the salt-works, and Smalley was to furnish the land upon which they were to be erected. In pursuance of this agreement Smalley afterward procured a lease of a tract of land, including the demanded premises, from one Ricketson the owner, by which the same was granted and demised to him for an indefinite period of time, and so long as the salt-works then intended to be erected should continue to be used. By virtue of this lease the legal estate was vested in Smalley during his life, determinable by his ceasing to occupy the salt-works. On the 8th of April, 1817, Smalley conveyed an undivided fourth part of the demanded premises to Thomas

Cushing. This was intended as a mortgage or security, and a bond of defeasance was given by Cushing to Smalley, but as this bond was not registered, and as the demandant had no knowledge of it when he extended his execution on the premises as the estate of Cushing, it is very clear, we think, that his title cannot be affected by that bond. The demandant therefore acquired by the levy of his execution against Cushing all the original title of Smalley to an undivided fourth part of the premises; and as to this part he would be clearly entitled to recover, but for the death of Smalley. By his death the estate of the demandant was determined, and his right of action destroyed. And this fact may be pleaded in bar of the action, or may be given in evidence on the general issue, if the parties so agree; and it being thus agreed in this case, it is clear that the demandant's title derived from Smalley can no longer be maintained: Jackson on Real Actions, 168.

The same objection would apply to the title derived from Thacher, if he and Smalley were seised in common, as the demandant contends they were, by virtue of their agreement, and by the erection of the salt-works. We are, however, of opinion that Thacher had no legal title to the land; and that, therefore, it is immaterial whether the salt-works are fixtures or not. The legal estate was clearly in Smalley; and if the works were fixtures, they passed with the land, and if they were personal property, the demandant acquired no title to them by the levy of his execution. All the right or interest which Thacher had in the land was a parol license to enter for the purpose of repairing and using the salt-works; but this is not such a title as would enable him or his assigns to maintain a writ of entry. He was never seised, and therefore could not be disseised.

Nor can the demandant recover on his title by disseisin, or by estoppel.

True it is that Cushing, by virtue of the levy of his execution against Thacher, became actually seised by disseisin, and this title passed to the demandant under the levy of his execution against Cushing. But this was a wrongful seisin, and was defeated or determined by the entry of Smalley. He entered in 1823, and since that time he and one Nathaniel

Cushing, and their representatives (the tenants being administrators of Nathaniel Cushing), have occupied the premises; so that it is clear that the demandant cannot now recover on a title by disseisin.

Nor can he recover on a title by estoppel. Smalley and Ricketson were strangers and not parties to the proceedings between Thomas Cushing and David Thacher. They acted merely as appraisers, and had no right to object to the form of the proceedings. And besides, they might have been, and probably were, ignorant of their legal rights; and they were not bound to inform themselves as to the irregularity of the proceedings. As to the deed from Smalley to Cushing, his right only passed by it, and not a fee by disseisin. The words of the grant are, "all my right, title, and interest, in and to one undivided fourth part," etc. It is true that the language of the covenants is more extensive; but this will not enlarge the words of the grant so as to work a constructive disseisin of the land.

Upon the whole, therefore, we are of opinion that the demandant is not entitled to recover, and according to the agreement of the parties he is to be non-suited.

Judgment for tenants for costs.

A conveyance to J. M. and his generation, to endure "so long as the waters of the Delaware shall run," creates in the grantee only a life estate: *Foster v. Joice*, 3 Wash. C. C. 498.

## b

### By Will.

A life estate may also be created by will, as where a devise of land contains no words of perpetuity and no words appear in the will from which a fee can be raised by implication.

JACKSON *v.* EMBLER,  
Supreme Court of New York, 1817.

14 Johns. 198.

PER CURIAM. The lessors of the plaintiffs claim five-eighths of the premises as heirs-at-law of Henry Newkirk, deceased; and the defendant claims under title derived from the will of



Henry Newkirk, by which the premises are claimed as devised to his son James Newkirk. The words of the will are, "I give, devise, and bequeath, to my son James Newkirk, the two lots of land Nos. 5 and 6, in the last division of the five thousand acre tract, containing one hundred and forty acres." James Newkirk died before the commencement of this suit; and the only question is, whether, under the above devise, he took a fee or only a life estate. A life estate only passed under this devise. There are no words of perpetuity, nor is there anything in the will from which a fee, by implication, may be inferred. We are accordingly of opinion that the plaintiff is entitled to judgment for five-eighths of the premises.

## C

## By Jointure.

**A jointure is a freehold estate in lands or tenements, secured to the wife, which is to begin upon the death of her husband and continue during her life at least, unless terminated by her own act, and is usually a provision for the wife in lieu of dower.**

GROGAN *v.* GARRISON,  
Supreme Court of Ohio, 1875.  
27 Ohio St. 50.

JOHNSON, J. The defendant in error, Emma G. Garrison, formerly Emma Grogan, filed her petition for dower, stating therein that she was the widow of one William Grogan, who, during coverture, was seized of certain lands, out of which she asks an assignment of her dower as provided by law.

The property is described as being lot No. 9, etc., fronting on Fifth Street, Cincinnati, twenty-five feet, and also the southwest part of lot No. 10, etc., also fronting ten feet, on Fifth Street, each one hundred and sixteen feet deep, making thirty-five feet front by one hundred and sixteen feet in depth.

William H. Grogan, a minor, and the only son of the deceased, by a former marriage, and John Parker, administrator of William Grogan, are made defendants.

William H. Grogan, by his guardian, filed an amended answer, setting up as a bar to this action an antenuptial contract, a copy of which, by order of the Court, is made part of the answer.

To this the petitioner demurs, on the ground that said amended answer does not state facts sufficient to constitute a defense.

Upon the issue thus made the case was reserved for hearing to the general term, where it was held that the matters set up as a bar were insufficient, and decreed that the petitioner was entitled to dower.

This action is brought to reverse that judgment.

By the record it appears that the case came on for hearing at the general term, on the petition, amended answer, and demurrer thereto, upon the questions presented by the pleadings.

The Court, without directly passing on the demurrer, virtually does so by special findings of the truth of the facts stated in the petition; also that the defendant is in possession of the premises described in the petition, claiming the estate of the plaintiff therein, and that the plaintiff had notified him of her claim, and requested that her dower be assigned, which he refused to do. It is then adjudged that she be endowed of one equal third part of the lands in the petition described.

The Court then proceeds to find that as, by certain proceedings in the Probate Court of said county, the plaintiff's dower interest in said premises "has been set off in dollars and cents, all proceedings therefore to set off the same by metes and bounds, by virtue of any order of this Court, is waived by the parties hereto."

Upon this finding, it is ordered "that the plaintiff receive her dower in money, as set off to her in said Probate Court, and that defendant pay the costs," etc.

No mention is made of the demurrer; but the findings and judgments that she was entitled to dower was, in effect, sustaining it.

It is a little difficult to understand these two orders—the one that she is entitled to dower in one equal third part of the premises, and the other that the land had been sold in another Court, and dower in money already assigned; in which last proceeding she had waived her right to the relief sought in this action.

Assuming, however, that the record is defective upon this point, we proceed to an examination of the errors complained of.

The errors assigned are :

1. The Court erred in holding that the amended answer did not constitute a *statutory jointure* in bar.

2. In holding said answer did not amount to an equitable bar.

3. In holding that the petitioner was not estopped by reason of the facts stated in said answer.

4. In holding that the burden of proof was on the defendant to show that said antenuptial contract was reasonable.

As to this last assignment, it is sufficient to say that there is nothing of record to show that the Court did so hold. The demurrer having been virtually sustained, though not formally, there remained no defense to the action.

The defendant being a minor, it became the duty of the Court to be satisfied of the truth of the petition before rendering a judgment. The record shows the facts specially found, but no such holding as is complained of appears.

The remaining errors assigned make it necessary to give a full synopsis of the defense.

The amended answer, with the antenuptial contract which it sets up, states that previous to February 23, 1867, there was a treaty between the plaintiff and said William Grogan, concerning marriage between them; that she was of full age, and under no restraint; that he was many years her senior, and of feeble health, and was the owner of the premises described in the petition, and a small amount of personalty; that he had one child, the defendant, by a former wife; and that the terms of an adjustment of the rights of the plaintiff, in the event of

their marriage and her survivorship, were freely discussed and agreed on.

He agreed to enter into said marriage only on the condition that she would bind herself to accept, in the event of his death—an event then anticipated as not, likely, very remote—a certain interest in his estate, in full satisfaction of her claims as his widow; and on the 23d of February, 1867, she freely and voluntarily entered into a written agreement to that effect, which was duly executed and acknowledged by both parties, whereby it was stipulated that said Grogan, in consideration of said marriage about to take place with plaintiff, whose name was then Emma Mitchell, did thereby grant, bargain, sell, and convey to her, *during her natural life*, real estate in Cincinnati, described as follows:

“All that lot of land, situate in said city, *and being the one undivided one-third part of the southwest part of lot No. ten* [10], in Ewing’s subdivision, fronting ten [10] feet on Fifth Street, and running back on Kilgour Street, on lines parallel with said street last named, one hundred and sixteen feet nine inches [116 $\frac{3}{4}$  feet], said lot hereby conveyed *being part of ground purchased by said city* for the purpose of extending Kilgour Street.”

It is averred that this land so conveyed was in full satisfaction of her dower.

The parties were married February 24, 1867, and he died in August thereafter.

The answer concludes: “Wherefore, he denies that said petitioner is entitled to dower, *as claimed in the petition*, and asserts that adequate provision was made for her by the afore-said jointure, and prays *that her claim may be restricted to the premises set forth in the contract.*”

The prayer that *her claim*, which was to have dower in this ten feet as well as in the twenty-five feet in lot No. 9 adjoining, be *restricted* to the premises just described—that is, to the ten feet—would seem to imply that the pleader understood this contract as embracing a life estate in the undivided one-third of ten feet front by one hundred and sixteen feet deep, though,

in argument, it is insisted that this description embraced all of the ten feet front, and not an undivided one-third. We do not so understand it.

The will of deceased is printed as part of the record.

There is no statement of facts showing the extent and value of William Grogan's property at the date of the marriage, nor of the value of the part conveyed nor of that remaining, to enable the Court to say whether it was adequate or not.

There is no averment that the deed was ever delivered to her, or that she, either during or after coverture, ever had possession; on the contrary, the Court finds, as one of the reasons doubtless for sustaining the demurrer that the premises are in the possession of the defendant; and still more, that, by proceedings in the Probate Court, instituted, as they must have been, by the defendants, or one of them, the property had been sold and converted into money.

We mention this as accounting for the absence of such important averments in this defense.

Grogan died in August, 1867, and this petition was filed in 1870, and the presumption is that, during the interval, this real estate, now set up as a jointure, was held and controlled by the heir, and, for aught that appears, she declined to accept the provision thus made. Was she bound to accept it?

The petitioner declined to take under the will.

The will refers to this antenuptial contract, and declares that "she shall not have any dower in my real estate *described in the contract*; . . . that is to say, that said Emma Grogan shall have no dower in the real estate *mentioned and described in said contract*."

Let us inquire:

1. Was this antenuptial contract a legal bar to an action for dower?

If it was, then this action was improperly brought. The statute of Ohio, on this subject reads:

"Sec. 2. If any estate shall be conveyed to a woman as *jointure*, in lieu of her dower, to take effect immediately after

the death of her husband, and to continue during her life, such conveyance shall bar her right of dower.

"Sec. 4. That when any conveyance, intended to be in lieu of dower, shall, through any defect, fail to be a *legal bar* thereto, and the widow, availing herself of such defects, shall demand her dower, the estate and interest conveyed to such widow with intention to bar her dower shall thereupon cease and determine."

What, then, is a *jointure*, under this statute?

It is a word having a fixed legal *signification*, long prior to the enactment of our Dower Act?

The section quoted is, in fact, but the adoption of a similar provision, found in Stat. 27 Henry VIII, c. 1056, which enacted that where lands are settled to the use of the wife, "that then, in every such case, every woman having such jointure . . . shall not have title to any dower in the residue."

This Act of Parliament was enacted to prevent a woman from having both dower and jointure.

Before its passage, accepting a jointure was not a bar to her action for dower.

Under this statute the word jointure had as definite and well-defined legal meaning as any other legal term.

It was an estate made to the wife in satisfaction of dower. Sir Edward Coke says "that to the making of a perfect jointure, within that statute, six things are to be observed :

"1. It is to take effect for her life in possession or profit, presently after the death of the husband.

"2. It must be for her own life or for a greater estate.

"3. It must be made to herself, and to no other for her.

"4. It must be made in satisfaction of her whole dower, and not of part of her dower.

"5. It must be expressed or averred to be in satisfaction of her dower.

"6. It may be made either before or after marriage."

He adds: "So as to comprehend all in a few words: A jointure . . . is a competent livelihood of freehold for the

wife, of lands or tenements, to take effect presently in possession or profit after decease of the husband ; now, as dower *ad ostium ecclesiæ*, or *ex assensu patris*, is better for the wife, because, in respect to certainty, she may enter, than dower at common law where she is driven to her action, and therefore Britton call-eth dower *ad ostium ecclesiæ* and *ex assensu patris*, establishment of dower by the husband and assignment of dower after his decease (for nothing that is uncertain is established) ; so jointure (that hath the force of a bar of dower by said Act of 27 Henry VIII), is, hath been said, more secure and safe for the wife than dower *ad ostium ecclesiæ* or *ex assensu patris*, for besides it is as certain as these others, and she may enter into it, after the death of her husband, and not be driven to her action :” Coke on Lit., § 41, note 8.

A jointure with all these qualities is binding on the widow, and a complete bar to her claim : 1 Cruise Digest, title 7, ch. 1, § 19.

But it had to be as certain as dower *ad ostium ecclesiæ* or *ex assensu patris*, and to be better than these ; and, as Coke says, more secure and safe for the wife than either of these, or than dower at common law. It had to be established, so the wife could enter, after the death of her husband, and not be driven to her action.

It is said jointure is to be as certain as dower *ad ostium ecclesiæ* or *ex assensu patris*. How certain were they ?

Coke says : “ Dowment *ad ostium ecclesiæ* is where a man of full age, seized in fee simple, who shall be married to a woman, and when he cometh to the church-door to be married, then after affiance and troth plighted between them, he endoweth the woman of his whole land or the half or other lesser part thereof, and then openly doth declare the quantity and the certainty of the land which she shall have for her dower. Here be two things that the law doth delight in, viz. : To have this and the like openly done ; second, to have certainty, which is the mother of quiet and repose, and this word (moiety), above said to be intended of the half in certainty, and not of the moiety in common, which clearly appeareth in that here Little-

ton saith the quantity and certainty of the land :” Coke on Lit., title Dower, § 39.

So dower *ex assensu patris* must have the same quality of certainty. It must be “of parcels of his father’s lands or tenements with the assent of his father, who after assigns the quantity and parcels. In this case, after death of the son, the wife shall enter into the same parcel, without the assignment of any :” Coke on Lit., title Dower, § 40.

Jointure was as certain as dower *ad ostium ecclesiæ* or *ex assensu patris*. It was more secure and safe than either of these. It was, like them, an establishment of dower by the husband, and better than either of these, she might enter into it, after the death of her husband, and not be driven to her action. This was doubtless for the reason that it was evidenced by a conveyance in writing.

In Vernon’s Case, 4 Coke, 1, the leading one on the subject, it is said “that dower *ad ostium ecclesiæ* and *ex assensu patris* concluded the wife of her dower, if she entered into the land so assigned to her after the death of her husband, for these being in such form as the law requires to be dowers in law, an assignment of dower, when the husband was sole seized, cannot be made of the third or fourth part in common, but ought to be in severalty :” 1 Thomas’s Coke, 597.

At common law it was imperative as a requisite of dower that the husband should be *sole* seized.

Upon estates held in joint tenancy no dower would attach : Lit., § 45 ; 1 Scribner on Dower, 257.

So stringent was this rule, that where one joint tenant aliened his share, destroying the possibility of survivorship and severing the tenancy, the widow of the alienor could not claim dower : 4 Kent, 37 ; Coke Lit., § 31 *b*.

The reason for this rule is obvious, and applies with equal force to a jointure.

The sole seisin of the husband was indispensable, because only in such case could dower be assigned by metes and bounds, and as jointure was in lieu of dower, the same qualities as to the estate granted necessarily existed.



It must be so assigned as to be held in severalty without an action at law.

By the terms of our statute jointure must be an *estate*, conveyed as *jointure*.

If from any defect it fail to be a *legal bar* to dower, and the widow elects to take advantage of this defect, and demands her dower, the estate conveyed as jointure shall cease and determine.

In what sense, then, is this word jointure used? It was a term which, for more than two hundred years, had had a fixed legal signification. Long prior to the adoption of the Act of 27 Henry VIII, jointures were in common use, and their meaning well understood.

That statute, from which ours is almost literally borrowed, has been carefully considered in many reported cases by the most profound jurists of England. The repeated discussions, and the long line of decisions, growing out of this Act, and similar ones in most of the States of the Union, were doubtless familiar to our ancestors, who incorporated a like provision in the statutes of Ohio. They were men well versed in the common law, and especially that part relating to real estate.

It is well established as a rule of interpretation that where particular words or phrases have in law an acquired, fixed legal signification, and are thus incorporated into a statute, the legal presumption is that the Legislature meant to use them in this legal sense: *Turney v. Yeoman*, 14 Ohio, 207.

Where a statute speaks of a *deed*, it must be taken in its technical sense, as understood at common law—that is, a writing sealed and delivered by the parties: *Moore's Lessee v. Vance*, 1 Ohio, 10.

So, also, where the word *mortgage* is used, it will be assumed that it is used in its ordinary legal signification, as well understood at common law, and that the legal liabilities incident to it were understood to follow: *Per Scott, J., Medical College v. Zeigler*, 17 Ohio St. 52.

Guided by this rule of interpretation, and by the light of the authorities and decisions referred to, we are led to conclude

that the estate to be conveyed as jointure must possess those prime requisites enumerated by Littleton and Coke, which we have quoted—that there must be such an estate as the widow can enjoy in severalty. It must declare the “*quantity and certainty*” of the lands she shall have—the “two things that the law doth delight in”—first, to have it done under our land statute, by a solemn deed of conveyance; and, second, to have “in *certainty*, which is the mother of quiet and repose.” And Lord Coke adds, speaking of certainty in dower at the church-door, and commenting on Littleton’s text: “This word *moiety* means a half in *certainty*, not of *moiety in common*.”

In Winch’s Cases, p. 33 (London, 1657), it is said, to be a good jointure, a wife must have a sole estate, after the death of her husband.

In the case at bar the conveyance is fatally defective in this prime quality of certainty.

It conveys an undivided one-third for life. The widow cannot enter and enjoy in severalty; she would be driven to her action at law to have it assigned and set apart to her.

One of the prime reasons for making a jointure was to give the wife the right, without her action, to enter and be sole possessor.

Again, to constitute a good conveyance of an estate, the deed must not only be duly executed, but it must be delivered.

We therefore hold that this antenuptial contract, for the reasons stated, is not a good statutory bar.

II. The next inquiry is, was it good as an equitable jointure?

What constitutes an equitable bar is a question fruitful in decisions.

Much learning and many conflicting decisions can be found in the books.

The substance of all the decided cases is that any provision made before marriage, whether of lands and tenements, goods and chattels, or whatever description of property, that constitutes a valuable consideration, if fair, reasonable, and just, as between the parties, in view of all the circumstances of the

case, at the time the contract was made, will, in equity, be supported as a good equitable jointure : *Miller's Ex'r v. Miller*, 16 Ohio St. 532 ; 2 Scrib. on Dower, 385-401.

Each case must be determined on its own particular facts and equities.

Looking at all the facts disclosed by this answer, and the absence of averments, we have arrived at the conclusion that this contract is not, in equity, a bar.

It conveys less than *one-tenth* of the real estate ; no value is stated ; it was only for life, in less than one-third of the whole ; nothing was ever done to put her in possession ; no acceptance by her, or part performance ; and no facts stated to show that it was fair, reasonable, or just to her.

It has been an axiom, accepted for ages, that dower was to be favored ; that no widow should be barred of that ancient and cherished right, unless

1. There was settled upon her, in strict conformity to law, an estate, as jointure, possessing all those requisites already pointed out ; or

2. There were such adequate provisions made, in lieu of dower, as, under all the circumstances, was fair, reasonable, and just.

III. As to estoppel. Neither do we think the petitioner estopped. She has done no act during or since coverture that amounts to an estoppel.

Her antenuptial covenant to accept this conveyance in lieu of dower cannot have the effect to release her dower.

In the case of *Hastings v. Dickinson*, 7 Mass. 155, the Court says : " This leads us to the second ground, viz. : that the demandant's covenant ought to have the effect of a release of dower. But this effect cannot be admitted on any correct legal principle. It is true that a covenant never to prosecute an existing demand shall operate as a release to avoid circuity of action. But a release of a future demand not then in existence is void. Now in this case, the settlement being executed before marriage, the demand of dower had no existence, the same being inchoate."

In the case of *Vance v. Vance*, 8 Shepley (Maine), 364, the Court says: "There can be no estoppel by executory covenants not to claim a *right* which is first to accrue afterward. The covenants of the wife with the husband before marriage, that she will not claim dower in his estate, cannot operate by way of release, estoppel, or rebutter to bar her of her dower."

The judgment of the Superior Court is therefore affirmed.

WILLIAMS, R. P. 235; 4 Kent Comm. 55, 56; Boone, R. P. 72; *McCartee v. Teller*, 2 Paige, 511; *Vance v. Vance*, 21 Maine, 364; *Hastings v. Dickinson*, 7 Mass. 153; *Tevis v. McCreary*, 3 Met. (Ky.) 151. Marriage settlements now usually take the place of jointures: *Tiedeman*, R. P. 148.

## d

### By Marriage Settlement.

**Parties in contemplation of marriage may by contract, equitable and fairly made, fix the rights which each shall have in the property of the other during life, or which the survivor shall have in the property of the other after his decease, and thus exclude the operation of law in respect of fixing their rights.**

DESNOYER *v.* JORDAN,

Supreme Court of Minnesota, 1880.

27 Minn. 295.

GILFILLAN, C. J. The appellant and Stephen Desnoyer were married in this State May 7, 1873, and he died December 3, 1877, she surviving him. His estate being in course of administration, she applied to the Probate Court in Ramsey County, in which the administration was pending, asking that one-third of the real and personal property might be set off to her as the widow, and as her portion of the estate, pursuant to the statute. The application was opposed by the heirs, and the Probate Court denied it. She appealed to the District Court, and that Court found as facts that "previous to their marriage, and just prior thereto, and in contemplation thereof, said parties (appellant and Stephen Desnoyer) en-

tered into a mutual agreement in writing, executed by each of them under seal, and acknowledged before a notary public, and witnessed by two witnesses, whereby, in terms, Stephen Desnoyer, in contemplation of said marriage, and in consideration thereof, and in consideration of the services theretofore rendered to him by said Sally Johnson (appellant) as housekeeper, did grant and convey to said Sally Johnson, after his death, and for the term of her natural life, the real estate and appurtenances situate in the county of Ramsey, and State of Minnesota, described as follows (description), and did give and grant to her after his death, and during her life, the sum of \$500 per year out of his estate, to be paid to her in equal semi-annual installments, and did make the same a charge upon all his estate, and did also give to her absolutely at his death a horse, a buggy, a harness, a sleigh, and a cow. In consideration thereof, said Sally Johnson did, by said agreement, in terms release said Desnoyer for past services, and did release all dower and right of dower in his lands, and all her interest or claim of any kind in and to the estate and property of said Desnoyer, which might arise by reason of said marriage, except as to the provision made for her in said agreement." The Court also found the agreement was not cancelled or abrogated. The agreement was not recorded. The land described in it was owned and occupied as a residence by Desnoyer at the time of making the agreement and of his death, and was parcel of a tract owned by him of about three hundred acres. The contract was not produced on the trial, but the evidence as to its execution and contents was fully sufficient to sustain the finding of the Court below. Indeed, it is difficult to see how the Court could have found otherwise. And there is little, if any, evidence tending to show that it was afterward cancelled.

The question of appellant's homestead right (if it were to be conceded that it is not disposed of by this antenuptial agreement) cannot be considered; for, in her petition on which this proceeding is based, she expressly disclaims any intention to claim such right, and the evidence is not such

as to identify any homestead beyond that described in the agreement.

The agreement contemplated that, except as provided in the agreement itself, the appellant should be excluded from any right or interest in Desnoyer's estate that might otherwise accrue to her by reason of the marriage about to take place between the parties. In the absence of a valid agreement between the parties, the law fixes the rights which either the husband or the wife shall have in the property of the other, both during life and after the death of either. But it has always been permitted to the parties in contemplation of marriage to fix those rights by agreement, equitable and fairly made between them, and to exclude the operation of the law in respect to fixing such rights; so that, so far as the agreement extends, it, and not the law, furnishes the measure of such rights. That such antenuptial agreements might be made was recognized in the statute in force when this agreement was made: Gen. St. (1866) c. 69, §§ 1, 4; c. 48, §§ 14-17. The latter of these statutes did not limit (as appellant argues) antenuptial contracts to barring dower alone. It only prescribed what sort of provision for the wife, in any such contract, should have the effect to bar dower; that it must be a jointure of a freehold estate in lands for her life, at least, to take effect in possession or profit immediately on the death of the husband, or a pecuniary provision for her benefit in lieu of dower; such jointure or pecuniary provision to be assented to by her before the marriage. But it did not disable the parties to make an antenuptial contract which should, in any other respect, fix the rights of the parties in the property of each other.

The parties having made their contract, and it being one which they were competent to make, and there being nothing to impeach its fairness or equitable character, and it clearly providing that the wife shall have no right or interest in the estate of the husband other than that provided in the contract, this would seem to dispose of the case. But it is claimed that subsequent Acts of the Legislature confer on the wife, surviving her husband, rights in his estate which obtain, notwithstand-

ing the antenuptial contract stipulates she shall have none other than it provides for. At the time this contract was made, a widow was entitled to dower in the real estate of her deceased husband (unless barred, as in the statute provided), and in case of intestacy to certain allowances out of, and to the same distributive share of, his personal estate as a child of the intestate would have. Afterward dower was abolished, and in 1876 the Legislature passed an Act (Laws 1876, c. 37 ; Gen. St. 1878, c. 46, §§ 2, 3) which entitles the surviving husband or wife to a life estate in the homestead of the deceased, free from all claims on account of debts of deceased, and also absolutely to one-third of the real estate of which the deceased was seized during coverture, subject in its just proportion with the other real estate to such debts of deceased as are not paid out of the personal estate.

Unless the operation of this statute is prevented by the antenuptial contract, the appellant is entitled, as to the real estate at any rate, to what she claims. But, inasmuch as the contract excludes all such rights as the statute assumes to give, the latter can have no effect without overriding the former—that is, without impairing its obligation. Now, though the contract of marriage and its incidents, including rights of property depending on it, while such rights of property remain inchoate and are mere expectancies, may be within the power of the Legislature to vary or affect by subsequent legislation, it is not so with an antenuptial contract. Such a contract is founded on a high consideration. Rights under it are contract rights as much as any can be, not merely resting upon or incident to the relation of husband and wife. They are independent of such incidents. Such a contract is under the constitutional protection as much as any contract. So, even if the Legislature intended, by the statute last cited, or by that in 1876, regulating distribution of personal estate of a deceased person (Laws 1876, c. 42 ; Gen. St. 1878, c. 51, § 1) to give rights contrary to the provisions of antenuptial contracts then existing, the statute would, to that extent, by reason of the constitutional inhibition against laws impairing the obligation of con-

tracts, be inoperative; but we do not think the Legislature intended to affect such contracts in any way.

Judgment affirmed.

*Hosford v. Rowe*, 41 Minn. 245.

Antenuptial contracts may be made, which are not *jointures* or marriage settlements, but simply *contracts* fixing the rights of the parties in the property of each other: *Naill v. Maurer*, 25 Md. 532.

The marriage alone may be a sufficient consideration: *Gelzer v. Gelzer*, 1 Bailey's Eq. 387; *Wentworth v. Wentworth*, 69 Me. 247; *McNutt v. McNutt*, 19 N. E. R. 115. *Contra*: *Curry v. Curry*, 10 Hun, 368.

But see *Clark v. Clark*, 28 Hun, 509; *Young v. Hicks*, 27 Hun, 57.

## 2

### LEGAL LIFE ESTATES.

**A life estate created by operation of law is called a legal life estate, and arises as follows:**

#### 1

##### **Curtesy.**

**An estate by the curtesy is a freehold estate, not of inheritance, created by act of law, which the husband acquires at the death of his wife in the lands of which she was seized during their coverture.**

FERGUSON *v.* TWEEDY,

Court of Appeals, New York, 1871.

43 N. Y. 543.

FOLGER, J. This action cannot be sustained unless Harvey D. Ferguson, the testator, had in his lifetime an estate as tenant by the curtesy in the premises, or some part of them, which were recovered in the action of the respondents against Samuel G. Green, judgment wherein was rendered on the 1st of February, 1861. To establish such tenancy there were needed four things: Marriage, issue of the marriage, death of the wife, and her seisin, during marriage, of the premises in question. There is no dispute but that all of these existed, save the last.

It is a general rule that to support a tenancy by the curtesy



there must be an actual seisin of the wife: *Mercer's Lessee v. Selden*, 1 How. U. S. 37-54. The rule is not inflexible. There are exceptions to it. The possession of a lessee under a lease reserving rent, is an actual seisin, so as to entitle the husband to a life estate in the land as a tenant by the curtesy, though he has never received or demanded rent during the life of his wife: *Ellsworth v. Cook*, 8 Paige, 646. Wild, unoccupied or waste lands may be constructively in the actual possession of the wife: 8 J. R. 271. A recovery in an ejectment has been held equivalent to an actual entry: 8 Paige, *supra*. And it has been held that where the wife takes under a deed and there is no adverse holding at the time that actual entry is not necessary: *Jackson v. Johnson*, 5 Cow. 74. But the facts of this case open not the door for any of these exceptions to come in. Before the marriage of the testator to his wife she did convey by quit-claim deed the premises in question for a term which was in its duration as long as her life. The grantee in that deed, thus acquiring an estate for her life in the lands, did enter, and he and his assign held the possession up to her death and afterward. It is true that this deed was one of two interchanged between the parties to effect an amicable partition of premises held by them at that time in common. But the execution of these deeds, if followed as it was, by possession in severalty, was valid and sufficient to sever the possession for the lifetime of the testator's wife: *Baker v. Lorillard*, 4 N. Y. 257; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314, 21.

And from the time of the execution by her of that deed, until the day of her death, she had not, nor had her husband, actual possession of the premises; she nor he made claim to the possession of them; she nor he received rent or other profit from them; she nor he had right to ask possession or rent or profit. In short, there did not any fact exist which, for her lifetime, after the execution of the deed, gave her a constructive possession or right of possession. On the contrary, there did exist in another, so far as she and her husband were concerned, exclusive possession and right of such

possession for a term which ran for her life. There was then an outstanding estate for life in the premises which, beginning before her coverture began, did not end until her coverture ended. And it is settled that if there be an outstanding estate for life the husband cannot be the tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture: *Stoddard v. Gibbs*, 1 Sumner, 263-70; *In re Cregier*, 1 Barb. Ch. R. 598.

It is among the facts found by the learned Justice before whom the action was tried that the possession of the grantee in that deed and of his assign was actual and exclusive. It is found, also, that neither the wife of the testator nor the testator himself did at any time after the execution of that deed have actual possession of the premises or receive the rents and profits thereof. And these findings are upheld by the proof.

There is no escape from the conclusion that there was lacking one of the essentials in a tenancy by the curtesy in favor of the testator.

This defect in the plaintiff's case being fatal, it is not necessary that we examine the other questions involved.

The judgment of the Court below should be affirmed with costs to the respondent.

*Jackson v. Johnson*, 5 Cowen, 74; *Heath v. White*, 5 Conn. 228; *Pemberton v. Hicks*, 1 Binn. 1.

**Curtesy attaches not only to estates in fee simple and fee tail, but also to fees subject to a conditional limitation on failure of issue.**

THORNTON'S EXECUTORS *v.* KREPPS,  
Supreme Court of Pennsylvania, 1860.

37 Pa. St. 391.

A. devises land to B. and her heirs forever; provided, however, that if B. should die without issue living, then the estate should revert to A. B. marries and has a child, which dies, and then B. dies without issue living. The executors of A. claim that the land then reverted to A.'s estate; but B.'s husband claims curtesy therein. Does he have it?

*Held*, that on the death of B. the land would revert to A.'s estate, subject to the right of curtesy, which attached as an initiate right during coverture and became consummate on the death of the wife.

LOWRIE, C. J. The incidents of an estate do not depend upon the intention of the grantor of it; but are engrafted on it by law, and, generally at least, without any regard to the intention of the grantor, and even in disregard of it. Our inquiry, therefore, is not after the intention of the testator relative to the claim of curtesy, but for the character of the estate intended to be granted by him, and whether curtesy is an incident in law to such an estate.

What, then, is the character of this estate as given by the will? It is not an estate tail, because the devise does not propose to limit the descent of it to the issue of the devisee. It is a fee simple subject to an executory devise—that is, a conditional limitation by will, which defeats it and substitutes another estate in its stead, if the devisee should die *both* under age and without issue then living: *Smith's Executory Interests*, §§ 148–151; 4 *Casey*, 108.

Does the common law give the husband of the devisee curtesy of such an estate after it has been defeated by the happening of the conditions? We think it does.

The case of *Buchanan v. Shaffer*, 2 *Yeates*, 374, decides this on the authority of *Buckworth v. Thirkell*, though possibly the case might have been decided in the same way on other grounds. The principle of this latter case has been very ably attacked and defended in the argument here, and we shall not repeat the discussion. In favor of the principle we have *Kent* (4 *Com.* 32, 8th ed.); *Roper* (1 *Husband and Wife*, 38–43), and *Preston* (3 *Abst. of Title*, 372, 384); and against it, we have *Butler* (note 170 to *Coke on Littleton*, 241 *a.*); and *Park* (*Dower*, 163–191). *Roper* on one side and *Park* on the other go very fully into the discussion of the authorities and the principle. Its supporters go on the substance of the principal estate, and its assailants on the form of its creation; and, owing to the innumerable variety of the forms of expression in which the same substantial estate may be created, we think it much

more certain to attach the incidents to its substance than to the form of its creation.

On a subject that involves so many difficult questions we confine ourselves carefully to the case before us, and say that curtesy attaches to an estate in fee—that is, subject to a conditional limitation on the failure of issue.

The case is not affected by the Married Woman's Act of 1848, for that expressly retains the curtesy estate as it existed before.

Judgment affirmed.

As to limitation over to a third person, see *Hatfield v. Sneden*, 54 N. Y. 280. Curtesy does not attach to estates on condition: Washb. R. P. 174. The conditional limitation is equivalent to an executory devise: *Buchanan v. Sheffer*, 2 Yeates, 374. Curtesy vests by operation of law, more in the nature of an estate by descent than by purchase, and cannot be divested by a mere disclaimer: *Watson v. Watson*, 13 Conn. 83. Curtesy generally attaches in this country to equitable estates: *Houghton v. Hapgood*, 13 Pick. 154; *Nightingale v. Hidden*, 7 R. I. 115; *Tillinghast v. Coggeshall*, 7 R. I. 383.

## b

### Dower.

**An estate by dower is a freehold estate, not of inheritance, created by operation of law, which the wife acquires in the realty of her husband upon his death.**

GRAY v. McCUNE,

Supreme Court of Pennsylvania, 1854.

23 Pa. St. 447.

LEWIS, J. In *Leineweaver v. Stoeve*, 1 W. & Ser. 160, it was held that the acceptance by the wife of her distributive share of her husband's estate under the intestate law, did not bar her action of dower in lands which her husband had conveyed to a stranger, and which formed no part of his estate at his death. In *Borland v. Nichols*, 2 Jones, 43, the same principle was applied to the acceptance by a wife of a devise under her husband's will. The first was a decision under the Act of

1794, and the other under that of 1797. Both statutes had relation exclusively to the estates of which the husband died seised or possessed. They could operate on no other. And the last, which is the only one material to be considered here, is express in its direction that the acceptance of a devise of any portion of his estate "shall be deemed and taken to be in lieu and bar of her dower *out of the estate of her deceased husband*, in like manner as if the same were so expressed." It was held that the statute could not be carried beyond its letter, and that as its general provisions related to the estate which belonged to the husband *at the time of his death*, and the particular effect of acceptance was confined by the statute *to that estate*, the Courts could not, by construction, enlarge it. The decisions referred to were constructions of law, given to the single act of accepting a distributive share or a devise. But the case before us demands a decision upon an instrument of writing, sealed and delivered by the party in whose right this action is brought. A release under seal is good without a consideration; and where, as here, it inures by way of *mitter le droit*, words of inheritance are not necessary. It would be well to make use of the most appropriate words, such as *remisise*, *relaxasse*, *et quietam clamasse*, but these are not indispensable. The words *renunciare*, *acquietare*, etc., will answer as well. If one acknowledge himself *satisfied*, and discharge a debt, this is a good release: *Shepherd's Touchstone*, 327. The paper in question is duly executed under the hand and seal of Mary Ann McCune, in the presence of two witnesses. It bears date the 3d of July, 1835, when she was under no disability of coverture or otherwise. It is addressed, "To all to whom these presents shall come." It has come to the hands of the defendant below, and he gives it in evidence, and claims the benefit of it. He is not a stranger, but had possession of the property in dispute at the time of the execution of this instrument, and claimed to hold the land in fee simple under a conveyance from the first husband of Mary Ann McCune, dated the 11th of March, 1833. It would be a reproach to the law if this instrument under seal, thus fairly executed by the present Mrs.

Gray, were held to be null and void. It cannot be pretended by any one that it should be so regarded. It must, therefore, have effect according to its true intent and meaning. It is Mrs. Gray's own language, and therefore, in case of ambiguity or doubt, it is to be construed most strongly against herself. It was her business to express herself so as to be understood. If she intended merely to accept the provisions of her husband's will "in lieu of her dower *in the estate of her husband*," under the statute of 1833, it was her duty to say so. If the object was merely to acknowledge satisfaction of all right of dower out of the estate which belonged to her husband at his death, it was easy to say so, and it was her duty to say so in such language as could be readily understood. William C. McCune, in addition to his title as vendee under his conveyance from his father, was a son and an heir, and had an interest in knowing the extent of the satisfaction acknowledged. If he had not understood it as extinguishing all claims upon the land in his possession, it may be that he would have resorted to other measures for his protection. He might have raised a question in regard to the large provision made by the will for the widow, and the meagre one provided by the same instrument for himself. But the paper distinctly declared that said Mary Ann McCune *agrees* to take under the provisions of the will, and *accepts* the bequests therein, to her, *in lieu and full satisfaction of right of "dower at common law."* What is right of dower at common law? It is something more than right of dower out of *the estate of which her husband died seised*. Dower at common law is the one-third part of *all* the lands and tenements whereof her husband was seised, *at any time during coverture*. This is precisely the right which she released, and she has thereby discharged the land in controversy from her present claim. After making the declaration that although she had not signed the deed to William C. McCune, she "had signed an agreement of release to the same effect;" after receiving for herself and her children property more valuable than all the rest of the estate, including what was sold to William; and after an acquiescence of nearly twenty years in

the settlement thus made, she comes with a bad grace to ask a recovery contrary to the plain meaning of her own deed. The cause is put upon the effect and true meaning of that instrument as expressed upon its face. In Pennsylvania it is not necessary that a release should be dressed up in legal and technical form. It is sufficient if it be in substance a release. The intention of the parties will be carried out in a Court of law, as fully as if they were before a Chancellor, and governed by the principles of equity. The instrument of writing signed by the demandant, in connection with the other facts in the case, sustains all that is material in the plea.

It is true that a conveyance of her right of dower to a *stranger*, for a consideration moving from him to her, could not sustain the plea of a release to the *defendant* who had no privity with such stranger. The suit might, notwithstanding such conveyance to a stranger, be carried on for her use in the name of the demandant. This is all that was decided in *Pixley v. Bennett*, 11 Mass. 298. In Massachusetts, a conveyance to a party *out of possession* passes no estate, and is therefore not evidence under the general issue in a writ of entry : *Wolcot et al. v. Knight et al.*, 6 Mass. 420. And in an action of dower *the tenant who does not claim under such conveyance*, and who is *an entire stranger to the consideration*, cannot set it up as a defense. If it passed no right, it was clearly no defense. If it did pass a right, the action might well be maintained for the benefit of the grantee or his assigns. In either case the defendant, being a stranger to it, had nothing to do with it. This is all that has any relevancy to this case in *Robinson v. Bates*, 3 Metcalf, 40. It is clear that these decisions, although cited by the plaintiffs in error to invalidate the defense under the release relied on in the case before us, do not sustain their positions. William C. McCune was neither a stranger to the consideration nor to the instrument itself. It was not a transaction between strangers. The provisions in the will, which the widow accepted in satisfaction of her claim, were drawn from estates which, but for the will and the acceptance by the widow, would have descended or fallen upon William McCune

himself; and the language of the instrument, as well as its object, shows that it was intended to operate in favor of the party who relied upon it at the trial.

This disposes of the whole case, and renders it unnecessary to discuss the other questions raised in the assignment of errors.

Judgment affirmed.

4 Kent Comm. 36.

**To same point.**

STEVENS *et ux.* v. SMITH,

Court of Appeals, Kentucky, 1830.

4 Marsh. J. J. 64.

UNDERWOOD, J. In 1805, Joseph K. Glenn, then unmarried, executed an obligation to Smith, for the conveyance of sixty acres of land.

Afterward, to wit, in November, 1807, Glenn conveyed the land to Smith. Previous to the date of the conveyance, and subsequent to the execution of the obligation, Glenn married Mary, the wife at present of Stevens, she having since the death of Glenn, married Stevens. Said Mary did not unite with her former husband Glenn, in the execution of the deed to Smith. Since Glenn's death, Stevens and wife have filed their bill against Smith, praying for an assignment of dower, in the sixty acres of land, and the only question presented by the record is the validity of Mrs. Stevens' claim to dower, in virtue of her former marriage with Glenn.

By the common law, three things were necessary to vest in a woman a right to dower. 1st. That her husband, at some time, during the existence of the coverture should have been seized of the lands, in which dower is claimed, either in fee simple, or fee tail. 2d. Marriage. And 3d. The death of the husband, leaving the wife. There are, nevertheless, exceptions to these general propositions. A woman, for example,



shall not be endowed, both of the land given in exchange, and of the land taken in exchange, and yet the husband was seized of both: 1 Institute, 31, b.

According to the facts in the present case, Glenn had an actual seisin of the land conveyed to Smith, prior to his marriage with Mrs. Stevens. The possession in fact, of the sixty acres was transferred to Smith before the marriage, and never, during the existence of the coverture, did Glenn have actual possession of the sixty acres.

Before the conveyance executed in 1807, and subsequent to the execution of the bond for a title, in 1805, Glenn was legally seized in fee of the land, and while thus seized, the marriage took place, but notwithstanding such seisin it is manifest that he had no beneficial possession. By the contract with Smith, and the delivery of the possession to him, for his use and benefit, Glenn divested himself of the use and enjoyment of the land, and transferred it to Smith.

According to Coke, 1 Institue, 31, a woman shall be endowed where the husband is seized in law, as well as where the seisin is in deed, or a natural seisin, or, in other words, where the husband is in actual possession, holding a fee-simple title. But a man cannot become tenant by the curtesy, unless the wife be seized in deed. It is not material to dwell on the reason for the difference. As then Glenn was seized in law of an estate in fee simple, in the sixty acres, when the marriage existed, it conclusively follows that Mrs. Stevens is entitled to dower therein, unless the contract between Glenn and Smith, of 1805, and the delivery of the actual possession of the land to the latter, so operates as to destroy the right of Mrs. Stevens.

In the case of Winn, etc., v. Elliot's Widow, etc., Hardin, 482, it is said, "that before the statute of 27 Henry VIII, commonly called the statute of uses, the wife of the feoffee to uses was not to be endowed of the estate so held in confidence to the use of another, because the husband had no beneficial interest; and the wife of the *cestui que use* was not to be endowed, because there was no trust or benefit declared for her in the original grant. "The effect of the statute of uses was to con-

vert the interest of the *cestui que use* into a legal instead of an equitable ownership, and all the legal consequences of estates, dower amongst the rest, at once attached." Thus the marital rights of women, by the operation of this statute of Henry VIII were so enlarged as to entitle them to dower in estates conveyed for uses. How this statute was evaded by the scruples of the common-law Judges, notwithstanding the comprehensive terms used, and how *trusts* followed *uses*, are matters explained by Blackstone in his 2d vol., 335.

The doctrine in relation to dower in trust estates, at the common law, is well settled by numerous adjudications. A woman could not be endowed of a trust estate. See the English authorities referred to in note 183, on 1 Institute. See, also, the case of Claibourn *v.* Henderson, 3 Hen. & Mun. 322, and likewise the case of Bailey and Wife *v.* Duncan's Representatives, etc., 4 Monroe, 261, as well as that of Winn, etc., *v.* Elliott's Widow, already referred to. To impart to trust estates a dowerable quality was an object of the Virginia Legislature as early as 1785.

In 1796 our Legislature re-enacted the provisions of our parent State on this subject. See the 14th section of the Act, 1 Digest, 315.

Thus the provisions of these statutes have changed the law of dower in respect to trust estates. But it is important to notice that these statutes do not give the wife of the trustee a right of dower in the trust estate. It is the husband or wife of the *cestui que use*, or *cestui que trust* alone, who by virtue of the statute shall have, and hold, curtesy or dower in the use or trust estate. These Acts of Virginia and Kentucky place the wives of *cestui que trust* upon the same footing in respect to dower which the statute of the 27 Henry VIII effected in relation to uses. In the case of Winn, etc., *v.* Elliott's Widow, etc., the Court left the question open, whether a wife was entitled to dower in an inchoate estate, not reduced to a legal one during the coverture. This question fairly presented itself in the case of Bailey and Wife *v.* Duncan's Representatives, and was settled in favor of the wife's right.

The Court use this language :

“ In deciding upon the question under consideration, the main and only inquiry for the Court is to ascertain whether or not it was intended by the makers of the Act (to wit, that of 1797) to authorize a wife to recover dower in lands to which the husband had, at his death, an indisputable right in equity to a conveyance of the fee-simple estate, though the right be derived under an executory contract for the title, and not resulting from any use or trust expressly declared by deed. With respect to trusts of the latter sort, the provisions of the Act are too explicit in favor of the wife's right to admit of a difference of opinion ; and if we advert, as we should do, to the old law as it stood at the passage of the Act, the mischief which must have actuated the Legislature in making the change, and the remedy which the Act has provided, we apprehend but little doubt will be entertained as to the propriety of giving such a construction to the Act as will embrace all trusts, whether expressly declared by deed, or resulting from executory contracts by construction of Courts of Equity.”

An application of this doctrine would give the wife of Smith, if he had one, and if he had died between the date of his title bond in 1805 and his deed in 1807 a right to dower in the sixty acres of land.

Glenn's obligation was for an unconditional conveyance of the title. He was bound by the terms of his obligation to make the conveyance presently. In equity, therefore, he was the trustee, and the mere title-holder for Smith's use. Smith's wife was entitled to dower under the statute in this trust estate, resulting from the executory contract. The same principles which convert this estate into a trust, so that the statute operates upon it in favor of Smith's wife, brings the case within the influence of those doctrines of the law which exclude the right of the trustee's wife to demand dower. Here then, before Mrs. Stevens' intermarriage with Glenn, he had, by a contract, entered into upon ample and valuable consideration, become in equity the trustee and legal title-holder for Smith's use, and thereby placed himself in a situation in which the prop-

erty, so held by him in trust, could not thereafter be incumbered by the dower-claim of any woman he might marry. For, as already remarked, the law excluding the dower claims of the wives of mere trustees was not altered by the statute so as to better their condition.

The wives of *cestui que trust* alone, were benefited by the change.

It is worthy of remark that the equity of Smith, founded upon an executory contract originated before Mrs. Stevens married Glenn. From the face of Glenn's bond for a title he ought to have made the conveyance before his marriage. Equity often considers that as done which ought to have been done.

Glenn could have had no pretext for withholding the title, unless it might have been to secure the payment of the purchase-money. It does not appear that any lien on the land for that purpose existed. If it did appear, such a lien could not be regarded as a beneficial interest, coupled with the title, so as to give Mrs. Stevens a right of dower. It would be no more than the attitude of a mortgagee, who holds the title to secure his debt without conferring on his wife a right to dower.

It is laid down by Coke, 1 Institute, 316, that "a woman shall not be endowed by a seisin for an instant." This Court, in the case of *Tevis v. Steele*, 4 Monroe, 340, considering this doctrine with great propriety, in our opinion, lay more stress upon the nature of the interest than upon the duration of the seisin.

Looking to the true nature of the interests of the respective parties in the present case, under all the circumstances, it seems to be in conformity to the principles of equity, and the adjudged cases, to regard the beneficial seisin, which once existed in Glenn, as avoided by his executory contract with Smith, and the estate invested into a trust, of which Glenn's wife, now Mrs. Stevens, cannot be endowed; but in which Smith's wife, under the statute, might claim dower. Had Mrs. Stevens been the wife of Glenn at any time, when he

was beneficially seized, the law and justice of the case would have been for her.

As these facts are, the decree is affirmed with costs.

**The widow has dower in fees-simple, fees-tail, in limitations, and in estates upon condition.**

HOUSE *v.* JACKSON,  
Court of Appeals, New York, 1872.

50 N. Y. 161.

PECKHAM, J. The statute declaratory of the common law enacts that a widow shall be endowed of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage: 1 R. S. 740, § 1.

It is not necessary that the husband should have been seized of a fee simple absolute, to enable the wife to have dower. If he was seized of an estate in tail male, or of the heirs of his body, she shall have dower: Lit., § 53, 40, *a*; Com. Dig., title Dower, A. 6.

"Thus, generally, in every case where the issue which the husband may have by his wife by possibility may inherit, his wife shall be endowed:" Com. Dig., title Dower, A. 6; Park on Dow. 79; Perk., § 301; Lit., § 52.

So, where the husband is seized of a base or conditional fee, or of a fee with a determinable quality attached to it, she has dower.

The dower will attach subject only, when the determinable quality arises from defect of title, to be defeated by the avoidance of the estate of the husband: Park on Dow. 49; *Ib.*, 37.

So, if the husband have a defeasible estate in fee tail, his wife shall be endowed till his estate be defeated: Com. Dig. Dower, A. 6, and cases cited.

So, her dower terminates, if the conditional or base fee be ended, and the grantor enter for condition broken: *Beardslee v. Beardslee*, 5 Barb. 324.

"The seisin must be of an estate of inheritance, conferring the right to the immediate freehold, as the result of one entire limitation, or several consolidated limitations:" Park, 47.

Seisin of a vested remainder is not sufficient to give dower. So plain a point is decided in this Court: *Durando v. Durando*, 23 N. Y. 331.

I see no objection to the merger of this life estate of John Jackson, the father, in the vested remainder of his son, the husband of Mary L. Jackson, under the decision of *Moore v. Littel*, 41 N. Y. 66. This is a part of the same estate there adjudged. If the son should die in the lifetime of the father, I think the better opinion is that the estates divide again, and the widow is then not entitled to dower.

*Moore v. Littel* holds the estate of the son, prior to the death of the father, to be a vested remainder; the son was also seized in fact and in law of his father's life estate, and then became seized of the inheritance, subject to being defeated by his own death, prior to the decease of his father. In such case I think the wife has dower, subject to being defeated by the same means. The plaintiff claims that the sale of the son's life estate upon execution cut off his title.

It is a settled rule of the common law, laid down in the elementary books, that after dower has once attached, it cannot be extinguished or suspended by any act of the husband alone, in the nature of alienage or charge: Park, 191.

The rule is adopted in much broader language in our statute: 1 R. S. 742, § 16.

At common law there might have been an intermediate estate for years and yet the wife had dower—as estates for years were not highly regarded at common law. But *cessit executio* during the term: Com. Dig. Dower, A. 6; Perk., § 336.

So, if there be a mesne remainder for life, who surrenders his estate to the tenant for life (Ib.), though the surrender be upon condition, for the estate is gone until the condition be broken: Ib.

In this case there is no intervening estate. The husband is seized of the life estate in fact and in law, and he is also seized

of a vested remainder as adjudged, subject to be defeated of the remainder by his death prior to that of his father.

This is such a seisin as prevents the alienation of the estate or its incumbrance, to the prejudice of the wife's dower. In other words, dower attaches to such an estate, subject to be defeated as above stated, and as the husband survived the father, her dower becomes absolute. The decree must be modified according to these views, with costs to her—no costs to either of the others, and the cause remitted for further proceedings.

Judgment modified in accordance with opinion, and affirmed as modified.

Divorce *a vinculo* bars dower: *Whitsell v. Mills*, 6 Ind. 229; *McCraney v. McCraney*, 5 Ia. 231.

By statute in some States dower is preserved if the divorce was granted on the ground of the husband's misconduct: *Gould v. Crow*, 57 Mo. 200; *Schiffer v. Pruden*, 64 N. Y. 47; *Harding v. Alden*, 9 Me. 140; Gen. St. Minn. 1878, c. 62, § 24; *Holmes v. Holmes*, 54 Minn. 352 (56 N. W. R. 46).

Divorce *a mensa* does not bar dower: *Clark v. Clark*, 6 Watts & S. 85; *Gee v. Thompson*, 11 La. An. 657.

No dower in partnership property till partnership debts are paid: *Simpson v. Leach*, 86 Ill. 286; *Young v. Thrasher*, 21 S. W. R. 1104; Gen. St. Minn. 1878, c. 62, § 30.

Usual method of barring dower is by deed: *Elmendorf v. Lockwood*, 57 N. Y. 322.

## C

### **Curtsey and Dower as Modified by Statute.**

**Some States have abolished and others have greatly modified the life estates of curtesy and dower.**

## IN RE RAUSCH,

Supreme Court of Minnesota, 1886.

35 Minn. 291.

MITCHELL, J. Assuming the instrument (Exhibit A) to be in terms sufficient, if valid, to effect such a result, the question in this case is whether a married woman can, by contract with her husband, release and relinquish to him her incipient or in-

choate interest as wife in his real estate, so as to exclude her, as widow, from dower. We use the term "dower" because although "dower," strictly so-called, no longer exists in this State, yet the provisions of the present statute for the widow in the real estate of her deceased husband are rather in the nature of an enlargement than an abolishment of dower, and this inchoate right, under the statute, is of the same general nature as the inchoate right of dower at common law. It was a well-established rule of the common law that a wife could not relinquish her dower in the real estate of her husband by executing a release to him: 2 Scrib. Dower, 309. It is true that in equity deeds of separation of husband and wife, made through the agency of a trustee for the wife, would be enforced if their object was actual and immediate, and not contingent or future separation, and, if so provided in them, might exclude her from dower and distribution in her husband's estate: Cord, Rights Marr. Wom., § 114 *a*, *et seq.* But, whatever may have been the rule in equity, the power of the wife, even by a deed of separation, to release to her husband her inchoate statutory right in his real estate is excluded in express terms by the statute, which declares that "no contract between a husband and wife, the one with the other, relative to the real estate of either, or any interest therein, shall be valid:" Gen. St. 1878, c. 69, § 4. The inchoate interest of the wife in the real estate of the husband, while it is not an estate, or even a vested interest, yet is a valuable, although contingent, interest in real estate, and a release of it is "a contract relative to an interest therein," within the meaning of the statute.

As the husband died testate as to all his property, his widow would not, in any event, be entitled to any allowance or distributive share out of his personal property: Gen. St. 1878, c. 51, § 1; *Johnson v. Johnson*, 32 Minn. 513 (21 N. W. Rep. 725). Hence it becomes unnecessary to consider whether this release would have excluded respondent from distribution had her husband died intestate.

The judgment of the Court below must therefore be affirmed wherein it adjudges respondent entitled to an assignment of



her statutory rights in the real estate, but reversed wherein it adjudges her entitled to the statutory allowance out of the personal property of her husband.

Ordered accordingly.

But see *Scott v. Wells*, 56 N. W. Rep. 828. Dower may be regulated by statute: *Morrison v. Rice*, 35 Minn. 436. The inchoate interests of curtesy and dower cannot be divested by a sale on execution issued against the husband's lands: *Dayton v. Corser*, 51 Minn. 406. "Dower" construed: *Holmes v. Holmes*, 54 Minn. 352.

## d

### Homestead.

**A legal life estate is created in the homestead by statute in some States in behalf of the husband or wife, as the case may be. In Minnesota it arises as follows: "If there be a child or the issue of any deceased child living, and a surviving husband or wife (the homestead shall descend), to such husband or wife during the term of his or her natural life, remainder to the child or children and the issue of any deceased child by right of representation": Minn. Probate Code (1889), § 63.**

**This life estate vests at the instant of the death of the husband or wife.**

### WILSON v. PROCTOR, Supreme Court of Minnesota, 1881.

28 Minn. 13.

MITCHELL, J. This cause comes up on appeal from an order of the District Court, reversing, in part, an order of the Probate Court, and allowing the two items in the administrator's account hereinafter referred to. From this order, allowing these items, the heirs appeal to this Court.

The facts were all stipulated upon the trial in the Court below, and are as follows: "That the house occupied by Mary Wilson, the widow of the deceased, was the homestead of the said deceased at the time of his death; that the same, and the lots pertaining thereto, were occupied by his said widow continuously, from and after his said decease, as such homestead, by virtue of being the widow of deceased, without objection

on the part of any one ; that the real estate pertaining to said house consisted of three lots of a certain block in the city of Stillwater, lying side by side, each lot being 50x150 feet, and forming a tract one hundred and fifty feet square ; that said house is situate in part upon each of these lots ; that no particular part of said lots had been selected by said widow or set apart by the Probate Court as belonging or appertaining to said house, and as comprising with it said homestead. . . . The item of \$30.55 was paid by the administrator for repairs of fence around said lots, made by him after the death of the deceased ; that the item of \$266.64 was for three years' taxes upon said house and lots, accruing after the death of the deceased." These items of \$30.55 and \$266.64 are those from the allowance of which this appeal is taken.

From this state of facts it is clear that the widow had a homestead right in these premises, to the extent of the house and a quantity of ground on which the same was situate, not exceeding in amount "one lot," the premises being situated in the laid-out or platted part of a city containing over five thousand inhabitants. The duty of paying taxes and making repairs upon this homestead, during the continuance of the homestead right, devolved upon the widow, and not upon the estate of the decedent. This duty the law always imposes upon the person who has such present interest or estate in real property as entitles him to enjoy the use and occupation, and to receive the rents and profits of the estate. The case of a tenant of an estate for life is an illustration of the application of this doctrine almost too familiar to require the citation of authorities: 1 Washburn, Real Property, 97 ; Hilliard on Taxation, c. 6, § 24 *a*. But it was argued that, inasmuch as the widow had made no informal selection of a homestead, and no decree had been made by the Probate Court assigning a homestead to her, therefore she had no *vested* right or estate to or in any part of this tract, and that, until this was done, the whole remained assets of the estate in the hands of the administrator ; therefore, it was his duty to pay taxes upon the whole property, and to keep it in repair.

We think this is a mistaken view of the nature of the homestead right, and of the method of dedicating land as a homestead under our laws. We do not think that the homestead right of the widow or family of a decedent is dependent or contingent upon any formal act of selection on their part, or upon any order or decree of any Court assigning it to them. Whatever may be the law in some States, under different statutes, it seems to us that under our statute the method of dedicating land as a homestead is by visible occupancy and use: *Barton v. Drake*, 21 Minn. 299; *Ferguson v. Kumler*, 25 Minn. 183; *Thompson on Homesteads and Exemptions*, § 231. The date of the occupancy of the land is the date of homestead right. The purpose of a selection by the widow or family, or of an order of the Probate Court setting apart a homestead to them, is not to vest title in her or them, for that is already done by law. The only object of such selection or order is to determine whether there is any excess which may be the subject of administration, and to ascertain the exact boundaries or limits of such excess. The homestead right of a widow or minor children is no new right or estate. They have no general right of selection out of the whole body of the decedent's property. Their right is simply a transmission to them, or continuance in them, of the same right previously vested in the decedent and his family at the time of his death. The right vested in the widow at the instant of the death of her husband, without any act of selection on her part, or order of the Court, although one or both of these might be necessary to determine the precise boundaries of the homestead, where it was a part of a tract larger than the quantity allowed by law. The homestead, therefore, never becomes, even for an instant, a part of the estate of a decedent for the purposes of administration, so long as the homestead right continues.

In the present case there was vested in the widow, by virtue of the visible occupancy and use thereof by herself and husband before his death, and by herself after his death, a homestead right or estate in this tract of land to the amount of one lot, upon which it was her duty, and not that of the estate, to

pay taxes and make repairs. True, she was occupying, under the claim of a homestead right, more land than she was by law entitled to; for it appears that this property was situated within the laid-out or platted portion of the city of Stillwater, which, it was admitted upon the argument, had more than five thousand inhabitants. The homestead in such case is limited to a quantity of land not exceeding in amount one "lot." The word "lot," as used in our statute, evidently is not to be understood as synonymous with the words "tract" or "parcel," but in the sense of a city, town, or village lot, according to the survey and plat of the city, town, or village in which the property is situated.

This construction of the statute is not free from difficulty, but it is in accordance with the manifest intention of the Legislature, and seems to be the only construction that is practicable or reasonable. But in such case it was the duty of the administrator, if he desired to assert his right to the remainder of the tract for the purposes of administration, to call on the widow to designate, by selection, the boundaries of her homestead, or take some other steps to have the boundaries of her homestead determined and fixed, so as to ascertain what part of the tract he was entitled to the possession and control of as administrator. But, instead of so doing, he allows the widow to enjoy the use of the whole tract, and then applies the personal assets in his hands to make repairs and pay taxes upon the entire property. The manifest injustice of this to the next of kin, to whom the personal estate of the decedent belonged, points pretty conclusively to the conclusion that the course adopted by the administrator in this case was not the correct one.

Whether, under the circumstances, the administrator might not, with the consent of the next of kin or creditors, or under the direction of the Probate Court, be authorized to make repairs or pay taxes upon the homestead, when such becomes necessary, owing to the default of the occupants to save the reversionary interest of the estate from waste or forfeiture, we do not now determine. No such supposed state of facts is

made to appear in this case. Neither is it necessary to consider whether, in the present case, the administrator might not, under a proper showing, be entitled to be allowed a certain portion of the moneys thus expended by him, for the reason that the facts, as stipulated, furnish no basis for any such apportionment.

We are, therefore, of opinion that these two items contained in the administrator's account ought not to have been allowed. Ordered, therefore, that the cause be remanded to the District Court, with instructions to modify its order or judgment in accordance with this opinion.

## 3

## INCIDENTS OF ALL LIFE ESTATES.

## a

**Estovers.**

**Every tenant for life, or his personal representative, is entitled to reasonable estovers, such as wood from the land for fuel, fencing, agricultural erections and other necessary improvements.**

WHITE *v.* CUTLER,

Supreme Judicial Court of Massachusetts, 1835.

17 Pick. 248.

SHAW, C. J., delivered the opinion of the Court. The question in the present case, is whether a tenant in dower or her lessee has a right to cut wood upon the dower estate, for sale, to be removed and not used or consumed upon, or in connection with the estate.

We think that a reference to a few principles, which have been adopted and acted upon in decided cases, in our own State, will lead to a satisfactory decision of this question.

It was in effect decided in *Sargent v. Towne*, 10 Mass. R. 307, that a tenant for life has no right to cut growing trees, that such cutting would be waste, and that wild and unculti-

vated land cannot be deemed estate yielding annual rents or profits.

In the case of *Conner v. Shepherd*, 15 Mass. R. 164, it was decided that in this Commonwealth a widow is not entitled to dower in wild and uncultivated lands, held separately and distinct from houses, cultivated lands and other improved estate, first, because they yield no annual profit, and secondly, because the widow could not make the only beneficial use of them, of which they are capable, without committing waste and forfeiting the estate. These reasons apply as well to the case of a wood lot situated in the midst of a cultivated country; as to forest lands in their original state. But the Chief Justice, in delivering the opinion of the Court in this case, takes care in terms to limit its operation to the case of woodlands not used or connected with a cultivated farm, or other improved estate.

In the case of *Webb v. Townsend*, 1 Pick. 21, the general rule, that a widow is not dowable of wild lands, is confirmed, and it was placed more distinctly upon the ground that as a widow is to be endowed, not according to the value of the land, but according to the value of the annual rents and profits, and as uncultivated lands yield no rents and profits, dower therein would be nugatory and of no value.

But in a subsequent case, *White v. Willis*, 7 Pick. 143, it was held that a lot of wild land, which had been used by the husband in connection with his house and cultivated land, to supply wood for buildings, fences, and fuel, might be properly assigned to a widow as part of her dower, to enable her to take fuel and timber for repairs. It was also suggested, that a widow would have no right to take firebote, etc., from lands of her deceased husband, unless the land, from which it is taken, were included in those assigned as her dower.

A distinction was urged in the argument, between woodlands, kept by the owners to raise wood for sale, for purposes of profit, and wild lands, and that it would be hard to deprive a widow of her dower in such lands, of which the raising of wood for sale may be considered as the most profitable use.

But we think the answer results from the legal principles on which the foregoing cases are settled. Such estate yields no annual profit. The owner may make a profit of the land, but it is in the exercise of the rights of a tenant in fee, which a tenant for life, by law, does not enjoy, that of felling growing trees. The result we think is that a widow is not to be endowed of a lot of growing wood and timber, although kept purposely to raise wood and timber as objects of profit, provided that it is not assigned to her as part of her dower, in connection with buildings or cultivated lands. But when woodland is so connected and used, it may be included in the assignment of dower, to be used and enjoyed by the widow, or those holding under her.

But the right of the widow thus acquired is that of reasonable estovers, under which may be included firebote or the necessary fuel for the supply of the dower estate. But this right of reasonable estovers is confined strictly to wood and timber sufficient for the supply of the estate, and it must be actually applied, used and consumed upon the estate, or for purposes connected with its proper use, occupation, and enjoyment. It has been recently decided that cutting growing trees, to be exchanged for other wood to be used as fuel or timber on the estate, was not within the right of a tenant in dower, but in law was deemed waste: *Padelford v. Padelford*, 7 Pick. 152.

*A fortiori*, the cutting of wood for sale, the proceeds of which are not to be used or appropriated upon the estate or in connection with it, is not admissible, under the limited right of taking reasonable estovers.

If the plaintiff, as lessee of the tenant in dower, had no right to cut the growing wood, the defendant, as having the next estate of inheritance, had a right to take the wood when severed: *Blaker v. Anscombe*, 4 Bos. & Pul. 25.

Plaintiff non-suit.

*Webster v. Webster*, 33 N. H. 18. The life-tenant cannot commit waste simply because his necessities require more than the regular rents and profits of the land: *Robertson v. Meadors*, 73 Ind. 43.

## b

## Emblements.

Such tenant is entitled to the growing crops which he has planted, if his life estate terminates before the harvest and after sowing, unexpectedly and without his fault; but it extends only to *fructus industriales*, and extends to sub-leases.

REIFF *v.* REIFF,

Supreme Court of Pennsylvania, 1870.

64 Pa. St. 134.

READ, J. The plaintiffs in error were the lessees of a farm of 152 acres, from their mother, a widow, who had a life estate in it under the will of her husband, their father. They were annual lessees from the 1st April, 1866, 1867, and 1868, the widow dying on the 15th June, 1868. At the time of her death, there was standing uncut on the premises, a quantity of mixed timothy and clover grass, a quantity of grass, part meadow and part timothy, and a quantity of timothy exclusively. The question was, was this grass *emblements*, belonging to the tenants of the deceased owner of the life estate. The vegetable chattels called *emblements* are the corn and other growth of the earth which are produced annually, not spontaneously but by labor and industry and thence are called *fructus industriales*. The growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements: because as it is said the improvement is not distinguishable from what is natural product, although it may be increased by cultivation: 1 Williams on Executors, 670, 672.

The learned Judge in the Court below is a practical farmer, thoroughly acquainted with the established usages of our State, and we have no hesitation in agreeing with him that this crop of hay was not emblements, and belonged to the executors of the testator.

Judgment affirmed.

Stewart *v.* Doughty, 9 Johns. 108; Fobes *v.* Shattuck, 22 Barb. 568; Chesley *v.* Welch, 37 Maine, 106. The tenant has a right to enter and take his crops: Forsythe *v.* Price, 8 Watts, 282.



## C

**Duties of Life-Tenants.****Interest.**

**The life-tenant is to keep down interest on incumbrances, but is not chargeable with the principal.**

THOMAS *v.* THOMAS,

Court of Chancery, New Jersey, 1866.

17 N. J. Eq. 356.

BEASLEY, C. J. The only controversy in this case is that which has arisen between the defendants, and it is one in which the complainant has no interest. It appears upon the answers which have been filed, and, although it is thus presented in a form somewhat irregular, an opinion will be expressed on the points which have been argued, as by this course the necessity of further litigation may be avoided.

The object of the suit is to foreclose a mortgage. Luther S. Thomas, who was the mortgagor, by his will, devised the mortgaged premises to the defendant, Lemuel Thomas, on condition that he would permit the other defendant, William H. Stanford, to carry on the business of a druggist, in a certain part of the premises then occupied by him, so long as he might desire to use it for that purpose, at an annual rent, not to exceed \$100, it being expressly provided that this privilege should be personal, and should not extend to his representatives or assigns. The testator then bequeathed to Mr. Stanford the stock and fixtures in the drug store above mentioned, and also all money standing to his credit in the Mechanics' Bank, at Newark, on condition that he should pay all the testator's debts, for which he was liable on account of said stock in the business of said store. By subsequent clauses, divers specific legacies are given to various persons, and the residue of the estate to one of the brothers of the testator.

The questions discussed before me relate to the proper mode of marshaling the assets of the estate according to equitable rules, in view of these testamentary dispositions.

It was insisted by the counsel of Lemuel Thomas, who is the devisee of the fee in the mortgaged premises, that the residuary estate, in the first place, must be applied in payment of the mortgage debt; and that, as that will not be sufficient, the specific legatees must contribute *pro rata* with the mortgaged property to discharge the residue of such debt. The argument urged in support of this position was that the bond and mortgage in question had been given by the testator himself, and that consequently this represented a debt due from him by specialty, and that it was the well-settled rule that in such cases, upon exhaustion of the residuary fund and the pecuniary legacies, the specific legacies and the land devised, when there is neither land charged with debts nor land descended, must bear the burden in the ratio of their respective values. In support of this proposition various authorities were cited which fully sustain it.

But the rule thus contended for and established does not apply in the present instance. There is a circumstance in this case which did not exist in those recorded in the authorities referred to. They belonged to the class of cases in which the debt secured by specialty had not been imposed by the testator himself on any part of his estate, and under such conditions undoubtedly the rule above propounded obtains. But when there is a specific lien on the real estate devised, as in the case now before me, a different principle of distribution is introduced. If this debt of the testator existed in the shape of a bond, it would have been no lien on any part of the estate; but if the holder of such specialty had proceeded to enforce his claim, after the exhaustion of the personal assets, which would, of course, be the primary fund, and had proceeded to raise the residue out of the real estate, in such case a clear right in equity would have supervened in the devisee to call upon the specific legatees for a ratable contribution.

In such an attitude of rival interests, according to the established gradation of liability, the appropriation would be, first, the residuary fund; next, general pecuniary legacies; and then, *pari passu*, specific legacies and devised lands. This was

the order of contribution recognized and acted upon in the case of *Shreve v. Shreve*, decided in the Court of Appeals of this State, in the Term of June, 1864. But the distinction is between the mere general right of the holder of a specialty debt to levy it at his pleasure on the real or personal estate, and the lien growing out of such debt, imposed by the testator himself upon the land. In such event, the doctrine has been long established that after the application of the general residue of the estate, the land thus incumbered must solely bear the burden. By force of such a testamentary disposition the devisee of the incumbered land cannot disappoint either the specific or general legatees.

The early decisions in which this rule is propounded and applied are those of *Lutkins v. Leigh*, *cases tempore Talbot*, 53, and *Forrester v. Leigh*, *Ambler*, 171. And in more modern times the rule has often been received as of unquestionable obligation, both by text writers and in judicial opinions: 2 *Roper* on Leg. 957; 2 *Williams* on Ex'rs, 1453; 2 *Jarman* on Wills, 428, and the cases cited.

In the case in hand, therefore, in my opinion, that part of the estate of the testator which is comprehended in the residuary clause of the will, must be first taken and applied to the payment of the debts, including the claim of the complainant, and the residue of such claim must be paid out of the mortgaged property. For the payment of this debt, the specific legatees cannot be called upon to contribute.

The counsel of the defendant, Lemuel Thomas, further insisted on the argument that the interest of Mr. Stanford in the mortgaged land must be held liable, proportionately, for payment of the complainant's demand.

There appears to be no room for doubt on this point. The will gives this defendant the right to enjoy a part of the mortgaged property, paying a rent, the maximum of which is designated, as long as he may desire to use it as a drug store. This gives Mr. Stanford a freehold interest in the premises; his estate is deemed, in law, one for life: 1 *Washb. on Real Prop.* 88. One of the incidents of such an estate is that the

tenant must keep down the interest of the incumbrances on the property enjoyed by him, but he is not forced, as between himself and the reversioner or remainderman, to pay off the principal of any moneys charged upon it. And it is also equally clear that if he is obliged to take up, or his estate is taken to pay off the principal of such an incumbrance, he will become a creditor of the estate for the amount so paid, deducting the value of the interest he would have to pay during his life. See the rule as stated by Judge Story, 1 Eq. Jur., § 487.

But this and the other question discussed are aside from the purpose of this suit. The proper parties are not before the Court to authorize the marshaling of the assets.

The only decree, therefore, which can be rendered, is the ordinary one for the foreclosure and sale of the mortgaged property; and I shall consequently advise the Chancellor to make that decree.

The doweress is chargeable with only one-third of the interest: *Swaine v. Perine*, 5 Johns. Ch. 482.

#### **Taxes.**

**The life-tenant must pay the taxes.**

VARNEY *v.* STEVENS,  
Supreme Judicial Court of Maine, 1843.

22 Me. 331.

SHEPLEY, J. The last will of Jonathan Varney, deceased, contains this clause: "My will is that my said wife Dorothy Varney shall have the whole of my estate, real and personal, during her natural life." The general rule is that a devise of lands without words of inheritance gives only an estate for life. If the devise be accompanied by a personal charge upon the devisee, it is indicative of an intention to give a fee. And it has been decided that a devise of uncultivated lands, without words of inheritance, gives a fee. In this case there was no

personal charge imposed upon the devisee, and there was an express limitation of the devise by the words "during her natural life." And the introductory words, "as touching my worldly estate," "I give, demise, and dispose of the same in the following manner and form," cannot be considered as exhibiting an intention to give a fee in contradiction of the express limitation: *Crutchfield v. Pearce*, 1 Price, 353.

The tenant offered certain deeds, showing a sale of the premises by a collector of taxes, and a release of that title to himself. If it had been admitted, he would have taken under such a release according to his title; and the reversioners according to theirs. "A release of a right, made to a particular tenant for life, or in tail, shall aid and benefit him or them in the remainder:" *Co. Lit.*, § 453 and 267, *b*.

It was moreover the duty of the tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid; and by neglecting it, and thereby subjecting the estate to a sale, he committed a wrong against the reversioners. And when he received a release of the title, if any were acquired under that sale, he would be considered as intending to discharge his duty by relieving the estate from that incumbrance. To neglect to pay the taxes for the purpose of causing a sale of the estate to enable him to destroy the rights of the reversioners, would have been to commit a fraud upon their rights. This is not to be presumed. On the contrary he must be presumed to have intended by procuring that release to extinguish the title under that sale.

Having a legal right to the possession of the estate during the life of his wife, he is to be considered as occupying according to his legal rights, and not as a wrongdoer. "His possession is to be construed according to his rights:" *Liscomb v. Root*, 8 Pick. 376. He cannot therefore establish any title as a disseisor against the reversioner; and for that purpose only could the deeds offered have been received as evidence. To have established a title under them superior to that of the reversioner's, it would have been necessary to make some proof of the preliminary proceedings so far at least, as they were

to be derived from recorded and documentary evidence, even after such a lapse of time: *Blossom v. Cannon*, 14 Mass. R. 177.

As the tenant is considered as having during the life of his wife, occupied the estate according to his legal title, his possession could not be adverse to the title of the reversioners; and he cannot be entitled to claim "by virtue of a possession and improvement" under the statute, while he was thus occupying under a subsisting and valid title.

Judgment on the default.

*Reyburn v. Wallace*, 93 Mo. 326. But extraordinary assessments are to be borne ratably between the life-tenant and the remainderman: *Peck v. Sherwood*, 56 N. Y. 615. The tenant for life and the remainderman each pay insurance for their respective interests: *Kearney v. Kearney*, 17 N. J. Eq. 59; *Graham v. Roberts*, 8 Ired. Eq. 99; *Brough v. Higgins*, 2 Gratt. 408.

#### Waste.

**The life-tenant must not commit waste.**

KEELER *v.* EASTMAN,  
Supreme Court of Vermont, 1839.

11 Vt. 293.

BENNETT, Chancellor. The great subject of complaint seems to be the destruction of the sugar orchard, which it is alleged has been cut down and destroyed since the orator became possessed of the reversionary interest, in February, 1832. It is unnecessary to go into the particulars of the evidence, which is quite voluminous, and is evidently somewhat contradictory; but suffice it to say that it seems to be pretty well established from the current of the testimony, that the principal part of the chopping in the sugar orchard was prior to the winter of 1832, and this too by Seba Eastman and Charles Eastman, while Seba had the reversionary interest. The whole evidence taken together satisfies the Court that the farm, on the whole, has been managed by the tenant for life in a prudent and husbandlike manner; and that there have been no acts of

wantonness on the part of the defendant, or disregard to the ultimate value of the reversionary interest. Indeed, the value of the property seems to have been enhanced by the betterments and good husbandry of the defendant. We are not aware of any decisions in the Courts of this State, laying down any precise rules establishing what acts shall constitute *waste*; and, indeed, it is difficult there should be any. The general principle is that the law considers everything to be *waste* which does a permanent injury to the *inheritance*: Coke Litt. 53, 54; Jacob's Law Dic. 6 Vol. 393, Tit. Waste; 6 Com. Dig. Tit. Waste.

By the principles of the ancient common law, many acts were held to constitute waste—such as the conversion of wood, meadow, or pasture into arable land, and of woodland into meadow or pasture land—to which we might not, at the present day, be disposed to give that effect. These principles must have been introduced when agriculture was little understood, and they are not founded in reason, and many of them are inconsistent with the most important improvements in the cultivation of the soil. In England that species of wood which is designated as timber shall not be cut, because the destruction of it is considered an injury done to the inheritance; and, therefore, *waste*. From the different state of many parts of our country a different rule should attain in our Courts; and timber may and must, in some cases, to a certain extent, be cut down, but not so as to cause damage to the inheritance. To what extent a tenant for life can be justified in cutting wood, before he shall be guilty of *waste*, must depend upon a sound discretion applied to the particular case. It is not in this State *waste*, to cut down wood or timber, so as to fit the land for cultivation, provided this would not damage the inheritance, and would be according to the rules of good husbandry, taking into view the location and situation of the whole farm. So, to remove the dead and decaying trees, whether for the purpose of clearing the land, or giving the green timber a better opportunity to come to maturity, is not *waste*. We are satisfied that, when the wood or timber is cut with this intent, and is according to

a judicious course of husbandry, the tenant is not guilty of waste, though the wood or timber so cut may have been sold, or consumed off of the farm. This farm, it is to be remembered, is comparatively in a state of nature, and the town in which it is situated comparatively new; and what might constitute *waste*, as applied to one farm in one place, might not, when applied to another, in a different place.

Though the evidence is somewhat contradictory, we are not satisfied that the defendant has gone beyond his rights. The orator's bill is therefore dismissed. But inasmuch as the defendant has made declarations claiming the right to cut off all the wood and timber from the farm if he chose to do it, and threatened the doing of it, the bill was not brought without some apparent cause, and the defendant in this particular is not without fault; it is, therefore, dismissed without costs.

Sackett v. Sackett, 8 Pick. 309.



## II

### ESTATES LESS THAN FREEHOLD.

#### A.

#### ESTATES FOR YEARS.

**An estate for years is an interest in lands or tenements created by contract, whereby the tenant is to have possession of the premises for a fixed and definite period.**

**An estate for years is an interest in land, but this interest is treated for many purposes as a chattel.**

BREWSTER *v.* HILL,  
 Supreme Court of New Hampshire, 1818.  
 1 N. H. 350.

John Wheelock owned certain lands in 1776, and leased them to O. for the term of 985 years. O. entered the lands and died, leaving a will wherein he bequeathed all his "personal estate" to A., who conveyed his interest to the plaintiff. Plaintiff now brings ejectment to recover possession of the premises, and the question is: Did the term pass under the will as "personal estate"?

WOODBURY, J., delivered the opinion of the Court.

In this case the sole question is, whether the term mentioned in the plaintiff's writ would pass under a devise of "personal estate."

The boundaries between real and personal estate are, in certain instances, scarcely distinguishable; and indeed some species of property exist, which have been deemed real or personal, according to the character of the claimants, and the purpose for which they claim: *Vide* autho. cited *post* Mills *v.* Pierce, Rock. February, 1819.

But we are not aware of any established principles or precedents, which would make leases for years anything more than

"personal estate." The law in relation to them was settled before the land itself could be conveyed. They were then for short terms, and with an exclusive view to aid great landholders in the cultivation of the soil. Hence the lease passed to the lessee no interest in the premises; but was a mere contract, for a breach of which a recovery in damages against the lessor was the only remedy.

As the custom altered and leases for longer terms became common, the remedy of the lessee was by statute extended, and he was enabled to protect himself in the occupation of the land itself.

Yet all the incidents of a mere chattel were still attached to the term—whether its continuance was for one or for a hundred years. Livery of seisin was not necessary to pass the interest as it was to pass real estate. The lessee could not sustain a real action; but when ousted was obliged, as this plaintiff has been in this instance, to resort to trespass in ejectment. Nor could a real action be maintained against him; because he was not the owner of the realty and could plead *non tenure*. His interest could be devised, though at common law no real estate would pass by a will. It has always been held, too, that after the decease of the lessee, the term belonged to his executors or administrators, and not to his heirs.

Under statutes creating a lien upon the real estate of a debtor from the time of judgment rendered, leases for years have been decided not to be embraced. In wills, too, as in the present case, they have always passed under the expression "goods and chattels," and in some instances under that of "goods" alone. Nor is it necessary, that leases should be acknowledged and attested; as deeds must be that convey "lands and tenements:" Stat. 191.

But we are well aware of a common impression that long terms are "to all imaginable purposes a fee-simple estate;" that a power "to sell land" has been held to be duly executed by leasing it for nine hundred and ninety-nine years; that our statute of February 10, 1791, requires all leases for more than seven years to be recorded—and that according to *Denn v.*

Barnard an adverse possession by the lessee, under a long term, might in time enable him to claim a fee.

On principle, however, it is impossible to define at what number of years a lease shall become real estate. Its character cannot be changed by the length of the term. Nor does our statute, or the decisions last cited, appear upon examination to conflict with the idea that a lease for any number of years, is not, as to the lessee's heirs, anything more than "personal estate."

Let judgment be entered on the verdict.

**To same point.**

MURDOCK *v.* RATCLIFF,

Supreme Court of Ohio, 1835.

7 Ohio, 119.

LANE, Judge, pronounced the opinion of the Court. The plaintiffs claiming to be the heirs of Andrew Murdock, *inheriting his realty*, pretend to be entitled, in that character, to an account and distribution of the personal estate; and while they ask the account against one defendant they pray to be quieted in their possession against the others. The bill is objectionable for its multifariousness, as it attempts to combine in the same suit claims against different classes of defendants between whom subsists no privity.

But passing over this objection their rights to the personal property have no existence upon this state of facts. The plaintiffs are the brothers and sisters of the decedent, and in the absence of legitimate issue inherit his real estate; but as he died, without children, the law, Statutes of Ohio, c. 29, 236, s. 28, gives the whole of the personalty to the wife. Whatever then be the deficiencies of the administrator the plaintiffs have no interest in calling him to an account.

Their right to the college lot depends on the character of the estate which Andrew Murdock held in it; if it be not

inheritable their possession ought not to be protected. It was a lease upon an annual rent for ninety-nine years renewable forever. We know that such interests are usually treated as fees simple by the holders; that, in case of death, they are ordinarily transmitted to the heirs as realty without being accounted for by the administrator; that the law requires them to be appraised as real estate in sales under execution, St. c. 29, 103, s. 10; that such interests are liable to dower, St. 29, 250, s. 1; and perhaps it might be expedient for the Legislature to make them inheritable; but no proposition has been better settled, from the earliest days of the common law, than that a lease, of whatever duration, is but a chattel. In the absence of legislation it only remains for us to follow the current of authorities: *Bisbee v. Hall*, 3 Ohio R. 465; *Butler v. Cowles*, 4 Ib. 207.

The only statute we find upon this subject is contained in the "Act to establish the Ohio University:" Statute of Ohio, c. 6, 188, s. 10, which declares that the tenants or lessees shall enjoy and exercise all the rights and privileges which "they would be entitled to enjoy did they hold their lands in fee simple;" a provision designed, in our opinion, to secure to the tenants civil and political privileges; not to change the quality of their estates.

Counsel have argued this case upon another hypothesis: taking the lease to be a chattel, as the testator gave it to his wife for her life only, what remains after her life is not disposed of by will, but reverts to the testator to be distributed by his representatives. This doctrine when applied to chattels real, seems countenanced by the books: 6 Cruise, 287; *Forth v. Chapman*, 1 Peere Williams, 666; 1 Salk. 278. But our view of the case renders a decision unnecessary; if the estate of the widow was for life only, and a reversion substituted in the executors of the testator, subject to distribution, she was the executor and the distributee, and entitled to such reversion, and her rights became absolute, since the estate for life and the reversion met in the same person.

Bill dismissed.

## 1

## TERM.

**To create an estate for years the *beginning* and *ending* of the term must be certain or capable of being reduced to certainty.**

GOODRIGHT *v.* RICHARDSON,  
Court of King's Bench, 1789.

3 T. R. 462.

A lease was made in 1785 for three, six, or nine years, determinable in 1788, 1791, or 1794, and it was held to be a lease for nine years, terminable in three or six years by either of the parties by giving reasonable notice to quit.

Lord KENYON, C. J. There is no doubt of what Lord MANSFIELD's opinion would have been in *Ferguson v. Cornish*, as to the validity of the lease beyond the first seven years. In these cases the intention of the parties ought to prevail, if it be not contrary to law. It is true that there must be a certainty in the lease as to the commencement and duration of the term, but that certainty need not be ascertained at the time, for if in the fluxion of time a day will arrive which will make it certain that is sufficient. As if a lease be granted for twenty-one years after three lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and *id certum est quod certum reddi potest*, and such terms are frequently created for rating portions for younger children. Now in this case it is impossible to form any doubt respecting the intention of these parties. It was intended that this lease should take effect for three years, at all events, and that it should be in the election of either of the parties to put an end to it at that time, or at the end of six years, giving reasonable notice to the other. It is like a lease for a year, and so from year to year; where, if the lessee wish to determine it at the end of the year he must give reasonable notice to the other party. And though here either of the parties might have determined the lease at the expiration of the first three years, yet when the time elapsed, at which

notice ought to have been given for that purpose, the lease could not be determined till the end of the next three years. Consequently the lessor of the plaintiff is not entitled to recover.

ASHHURST, J. All that is required is either that the term should be certain in itself or reducible to a certainty. Now that is the case here, for it is for three, six, or nine years, as the case may happen, the parties having agreed that it should be determinable in the years 1788, 1791, 1794. It is therefore a lease for three years certain, or for six or nine years, unless the parties determine it sooner.

BULLER, J. This is a lease for nine years, determinable by either of the parties at the end of the first three or six years,\* for it is stated in the case that it is *determinable in the years* 1788, 1791, 1794. But if it were not determined at either of those periods the party first giving reasonable notice it was to continue for the nine years.

*Postea* to the defendant.

MURRAY *v.* CHERRINGTON,  
Supreme Judicial Court of Massachusetts, 1868.

99 Mass. 229.

The terms of the lease are contained in the following letter :

"I hereby let you the whole of my house in Mercer Street, in South Boston, when said house is suitable to be occupied by you, for a rent of four hundred and eighty dollars per annum to me, paid in monthly payments, or otherwise *pro rata*, and will give you the privilege of reletting to a good party such a portion of it as you may wish to ; but it is to be understood that, in case after two years subsequent to your moving into said house I should wish to live in the house myself, I can do so, and that then you may still retain, if you wish to do so, the second floor and front chamber and bedroom adjoining, for such a term as may be agreeable to us both."

FOSTER, J. 1. Upon very familiar principles, parol evidence was inadmissible to aid the construction of the letter from the plaintiff to the defendant, which was claimed to create a lease for years.

2. We are also of opinion that the ruling of the Presiding Judge was correct, that the terms of this letter did not create an estate for years—namely, a lease for two years—between the parties. The duration of a lease for years must be certain; this includes both its commencement and termination. It may be conceded that a lease for years may begin “when a house is suitable to be occupied,” according to the maxim, *Id certum est quod certum reddi potest*. But the fatal objection remains that no period of termination is fixed by this letter. A leasehold interest for an uncertain and indefinite term is an estate at will only: SHAW, C. J., in *Cheever v. Pearson*, 16 Pick. 271; *Bishop of Bath’s Case*, 6 Co. 35; *Bac. Ab. Lease*, L. 3. It is indisputable that an entry by the lessee under this instrument would not bind him to remain for any definite period. He could terminate his tenancy in the modes provided by statute. As to him, there is no term of certain duration. Consequently there can be none as to the landlord.

The proviso, that after two years from the commencement of the occupancy the landlord may live in the house if he wishes to do so, and that then the tenant may still retain, if he wishes, certain rooms, cannot change the construction. This clause has no tendency to show that the tenant was bound to remain during the two years.

Exceptions overruled.

1 Wood, L. & T. 74; *Horner v. Leeds*, 25 N. J. L. 106; *Lemington v. Stevens*, 48 Vt. 38; *Doe v. Needs*, 2 M. & W. 129. The word “term” designates the estate the tenant has, and is often used also to designate the duration of the interest: *Batchelder v. Dean*, 16 N. H. 265; *Doe v. Dixon*, 9 East, 15; *Wright v. Cartright*, 1 Burr. 282.

## a

**How created.**

**An estate for years is created by *express* contract, technically called a lease, and may be for one or more years or for a shorter period ; as, for months or weeks or days.**

BROWN'S ADMINISTRATORS *v.* BRAGG,

Supreme Court of Indiana, 1864.

22 Ind. 122.

WORDEN, J. On the 1st of April, 1859, Brown let to Bragg certain real estate, to be held by the latter for the term of one year from that date ; for which Bragg was to pay, as rent, the sum of \$450, to be paid quarterly, at times specified in the instrument of writing creating the tenancy executed between the parties. On the 1st of December, 1859, a quarter's rent being due and unpaid, Brown served on Bragg a notice to quit the premises at the expiration of ten days, unless the rent in arrear should be paid within that time.

Bragg failing to pay the rent or quit the premises, this action was brought by the representatives of the lessor to recover possession. The suit was brought before the expiration of the term.

The Court below held, on the facts above stated, that the plaintiffs were not entitled to recover, and we think the decision was in accordance with the law of the case.

We suppose that, independently of any statutory provisions, the proposition that the failure to pay the rent due, did not work a forfeiture of the estate of the tenant, is too clear to require the citation of any authorities in its support. In order that a failure to pay rent should work a forfeiture, it should be so expressed in the lease or agreement of the parties, which was not done in the case before us. As well might a man who sells a horse to be paid for in the future, claim to recover him back on failure of the purchaser to pay according to his stipulation, as the lessor of real estate to recover it from his



tenant because of his failure to pay rent, there being no stipulation that such failure should work a forfeiture.

But we have the following statutory provision, which is claimed by the appellants to be applicable to the case before us. "If a tenant at will, or from year to year, or for a shorter period, neglect or refuse to pay rent when due, ten days' notice to quit shall determine the lease, unless such rent shall be paid at the expiration of said ten days:" 2 G. & H., p. 359, § 4.

The case before us does not come within any of the clauses of the statute above set out. It is clearly not a tenancy at will, nor for a shorter period than a year; and it seems to be equally clear that it is not a tenancy from year to year. The Legislature, in the second section of the Act above cited, have provided what shall be deemed tenancies from year to year, viz.: "all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord." By the words "all *general* tenancies," we think it clear that the Legislature meant such tenancies only as were not fixed and made certain in point of duration by the agreement of the parties. This is apparent from several considerations. Where lands are demised for a definite term, no notice to quit is necessary in order to terminate the tenancy. See cases in *Perk. Dig.*, p. 350, § 5. Yet the Legislature have provided for terminating tenancies from year to year by three months' notice to quit: Section 3. It would be an absurdity to suppose the Legislature intended to change tenancies for a fixed period, whether for one year, or more, or less, into tenancies from year to year, and then enable the landlord to terminate them by three months' notice to quit. The statute seems to be merely declaratory of the common law on the subject. Says Chancellor KENT, "estates at will, in the strict sense, have become almost extinguished, under the operation of judicial decisions. Lord MANSFIELD observed that an infinite quantity of land was holden in England without lease. They were all, therefore, in a technical sense, estates at will; but such estates are said to exist only notionally, and where no certain term is agreed on, they are construed to be tenan-

cies from year to year, and each party is bound to give reasonable notice of an intention to terminate the estate. The language of the books now is that a tenancy at will arises from grant or contract, and that general tenancies are constructively taken to be tenancies from year to year:" 4 Kent Com., § 10, p. 128.

In the case before us, the tenancy, by the agreement of the parties, was for a year, neither more nor less. Hence it is wholly unnecessary to determine what is meant by the words "or for a shorter period," in the section of the statute above quoted; but we doubt whether they should be construed to embrace a tenancy for a fixed and definite period. The interpretation that presents itself as the most reasonable is that they embrace a tenancy uncertain as to duration, but one which appears to have been intended by the parties as less than a year. But on this point nothing is decided.

The lease in the case before us created an estate which the law defines to be an estate for years. Such would also have been its character had it been less than a year in duration. "Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years:" 2 Shars. Blackstone, p. 142. "Estates for years embrace such as are for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great:" 1 Washburn on Real Estate, p. 291.

The defendant being a tenant for years, and not at will, or from year to year, or for a shorter period, it was not competent for the lessor to terminate the tenancy before the expiration of the term, on the ground of failure to pay the stipulated rent.

PER CURIAM. The judgment below is affirmed, with costs.

WILLIAMS, R. P. 388, 393; 1 Washb. R. P. 476; 1 Taylor, L. & T. 54; 1 Wood, L. & T. 74. Agricultural lands in Minnesota cannot be leased for more than twenty-one years: Minn. Const., Art. I, § 15.

## b

**Time computed.**

**A lease for a term of years "from the first day of July" begins on the second day of July.**

**ATKINS v. SLEEPER,**  
**Supreme Judicial Court of Massachusetts, 1863.**

7 Allen, 487.

Plaintiff made a lease of certain premises to defendant "for a term of three years from the first day of July, 1858," rent payable quarterly, and if the defendant held for a longer time he was to pay rent accordingly. On July 1, 1861, defendant gave written notice that he would vacate the store on or before October 1, 1861, and accordingly on that day the store was vacated and the keys offered to plaintiff, who said that he still regarded defendant as his tenant and should expect another quarter's rent. The premises remained vacant for the full quarter, and on defendant's refusal to pay the rent for the time plaintiff brings this action to recover the same until January 1, 1862. There was judgment for the defendant.

CHAPMAN, J. The original lease from the plaintiff to the defendant was "for the term of three years from the first day of July, 1858." The plaintiff contends that the term commenced on the 1st day of July, and the defendant contends that it commenced on the next day. The inclusion or exclusion of the day of the date of an instrument, in the computation of time, has been a much vexed point; but in a case like the present the authorities are in favor of the defendant. In 4 Cruise Dig. (Greenl. ed.) tit. xxxii, c. 5, § 16, the rule is stated to be, that if a lease be made to hold from the date, or the day of the date, that day is excluded; but if it be to hold from the making, it includes the day. It is stated in still better phraseology in § 17, n. 2. Where time is computed from an act done, the general rule is to include the day. Where it is computed from the day of the act done, the day is excluded. The same rule is stated in 2 Parsons on Con. 179, n. It has been adopted by this Court, and must be regarded as settled in this Commonwealth: *Bigelow v. Willson*, 1 Pick. 494; *Wiggin v. Peters*, 1 Met. 127; *Farwell v. Rogers*, 4 Cush.

460 ; *Seekonk v. Rehoboth*, 8 Cush. 371 ; *Buttrick v. Holden*, *Ib.* 233.

Exceptions overruled.

As to the method of computing time, see : *Deyo v. Bleakley*, 24 Barb. 9 ; *Bemis v. Leonard*, 118 Mass. 502 ; *Ordway v. Remington*, 12 R. I. 319 ; *Ackland v. Lutley*, 9 Ad. & E. 879 (36 Eng. Com. Law, 312) ; *Arnold v. United States*, 9 Cranch. 104 ; *Sheets v. Selden's Lessee*, 2 Wall. 177 ; *Seekonk v. Rehoboth*, 8 Cush. 371.

### C

#### Perpetual renewal.

**In a lease creating an estate for years, a covenant for the perpetual renewal of such lease is valid if clearly expressed or if such appears to be the intention of the parties thereto.**

#### BLACKMORE *v.* BOARDMAN, Supreme Court of Missouri, 1859.

28 Mo. 420.

The directors of the St. Louis public schools demised and leased to Blackmore certain premises for ten years, with a covenant for a perpetual renewal. These premises so leased to Blackmore were sold on execution to one Lewis, who went into possession thereof and while in possession conveyed his interest to Hagre, who in turn sold to Boardman. Prior to the expiration of the original lease Hagre made application to the directors for a renewal thereof, and Blackmore also made application for a renewal to him, to which Hagre filed a remonstrance. The directors renewed the lease to Blackmore. The two questions presented were whether the covenant for perpetual renewal was legal and whether the right of renewal was acquired by Lewis under the sheriff's sale.

RICHARDSON, J. The numerous authorities cited by the defendant's counsel establish in his favor the first two propositions presented in the statement. As the law discourages perpetuities, it does not favor covenants for continued renewals ; but, when they are clearly made, their binding obligation is recognized and will be enforced. The covenant for renewal is only an incident to the lease, and as it cannot be passed without the principal, the conveyance of the principal by a proper

description will necessarily carry the incident. They are inseparable, and a right of action cannot exist in favor of a person claiming the benefit of the covenant without any right to the possession of the leasehold; but the covenant, being annexed to the estate, runs with it, and cannot be retained by itself or assigned or severed so as to give an independent cause of action. A sale of the land under execution will pass to the purchaser all the covenants that run with it as effectually as if he had received a conveyance from the lessee; for as the purchaser, after he acquires possession, is bound to pay the rent and in that way assumes the burdens of the lease, he has the right to take advantage of the covenants that touch and concern the thing demised, which enhance the value of the estate.

The parties agree that the application for renewal was in proper form, and, as the minutes of the board of directors show that the notice was before the board on the 11th of August, at the second meeting held after it had been left by Kurlbaum, we think his evidence was properly received. Notice left with a man about the office who had no authority to receive it of course would not bind the Public Schools, but, as the directors are not supposed to be all the time in session, it would seem that the secretary was the proper person with whom such applications should be left. It would be gross neglect in the defendant if he had left the notice with a chance man about the office, and had not returned again to inquire whether it had been received; but the agent was told by the secretary a few days afterward, and in ample time to have given another notice, that it had been received, and under such circumstances it would be a fraud on him to hold that he had lost his rights by his negligence. The parties have requested that the controversy between them shall be determined in this Court in view of all the equities of the case, and, as the admission of the deceased secretary would certainly be competent in a proceeding by the defendant against the board of Public Schools to have specified performance of the covenant for renewal, we have less hesitation in deciding that the

evidence was admissible in this suit. The other Judges concurring, the judgment will be affirmed.

*Effinger v. Lewis*, 32 Pa. St. 367; *Page v. Esty*, 54 Maine, 319; *Boyle v. Peabody*, 46 Md. 623; *Banks v. Haskie*, 45 Md. 207; *Haure v. Burr*, 24 Barb. 625; *Brown v. Parsons*, 22 Mich. 24; *Holley v. Young*, 66 Maine, 520; *Sweetser v. McKenney*, 65 Maine, 225.

# d

## Land let "On Shares."

**A contract to cultivate a farm on shares does not create an estate for years, but by it the parties are owners in common of the crop.**

CASWELL *v.* DISTRICH,

Supreme Court of New York, 1836.

15 Wend. 379.

In this case a party agreed to till a certain farm, and for his work and care to take a certain specified quantity of the different kinds of crops raised thereon during the year.

NELSON, J. The agreement between the parties was a letting of the premises upon shares, and, technically speaking, was not a lease: 8 Johns. R. 151; 3 Ib. 221; 2 Ib. 421, n.; 8 Cowen, 220. There is nothing which indicates that the stipulation for a portion of the crops was by way of rent, but the contrary. The shares were of the specific crops raised upon the farm. It is very material to the landlord, and no injury to the tenant, that this view of the contract should be maintained, unless otherwise clearly expressed, for then the *landlord* has an interest to the extent of his share in the crops. If it is deemed *rent*, the whole interest belongs to the tenant until a division. Where a farm is let for a year *upon shares*, the landlord looks to his interest in the crop as his security, and thereby is enabled to accommodate tenants, who otherwise would not be trusted for the rent.

This case is clearly distinguishable from that of *Stewart v. Doughty*, 9 Johns. R. 108. There the Court, from the cor-

respondence between the phraseology of the instrument and the terms usual in leases in the reservation of rent, came to the conclusion that the proportion of the crops specified in the agreement was intended as payment of *rent in kind*, and that therefore the whole interest belonged to the tenant. If my conclusion be correct, then the parties were *tenants in common in the crops*, and as the plaintiff stood in the place of her testator, she was not entitled to sustain her action, and the Common Pleas did right to grant a non-suit.

Judgment affirmed.

*Walls v. Preston*, 25 Cal. 59; *Guest v. Opdyke*, 31 N. J. L. 552; *Creel v. Kirkham*, 47 Ill. 344; *Hurd v. Darling*, 14 Vt. 214.

## e

### Lease of building.

**A lease of a building, *eo nomine*, is a lease of the land on which the building stands.**

LANPHER v. GLENN,

Supreme Court of Minnesota, 1887.

37 Minn. 4.

GILFILLAN, C. J. At the common law the rule undoubtedly was that a lessee of real estate for a term, who had covenanted to pay the rent without excepting the case of destruction by fire or tempest of the buildings on the real estate, was not released from his obligation to pay the rent by such destruction. This was because the lease created an interest in the land, by virtue of which the lessee might, notwithstanding the destruction of the buildings, retain possession of the land to the end of his term. An exception to this, or, rather, a case to which, from the circumstances, the rule did not apply, was that of renting rooms or apartments in a building, in which case no interest in the real estate beyond that connected with and necessary to the enjoyment of the particular room or apartment

passed, and of necessity such interest ceased when the room or apartment ceased to exist; for in such a case, especially where there are several tenants, some above and some below, they cannot all have the realty "*usque ad cælum*." Such cases were, from the nature of the case, construed not to pass any interest in the land, independent of the particular room or apartment rented.

The lease in this case having been executed prior to the Act of 1883 (Laws 1883, c. 100), comes under the rule of the common law. Whether liability to pay rent continued, notwithstanding the building was destroyed by fire, must depend on whether the lease passed an interest in the land—that is, whether it was a lease of the land for the specified term. The description of the premises leased is this: "The real property situate in the county of Ramsey and State of Minnesota, and described as follows, that is to say: The two-story (and rear basement) frame stores and dwellings overhead, situated on the westerly side of Jackson Street, near what is designated on D. L. Curtice's 1880 map of the city of St. Paul as Winter Street, situated in the said city of St. Paul, being a portion of the east half of the northwest quarter of section thirty-one," "together with the appurtenances thereof."

It does not appear from the lease (nor otherwise) that any part of the building was excepted. The words "and rear basement" do not indicate it. They are to be taken as used to describe the building as a two-story and rear-basement building. It appears, therefore, that the entire building is covered by the description. Land may be granted or leased by the description of a building on it. "And by the grant of a house, the ground whereon it doth stand doth pass:" Shep. Touch. 90. A garden may pass by conveyance of a house: *Smith v. Martin*, 2 Saund. 400. The demise of a mill carries the ground on which it stands: *Bacon v. Bowdoin*, 22 Pick. 401. See, also, *Ammidown v. Ball*, 8 Allen, 293; *Hooper v. Farnsworth*, 128 Mass. 487; *Winchester v. Hees*, 35 N. H. 43; *Wilson v. Hunter*, 14 Wis. 683 (80 Am. Dec. 795); *Rogers v. Snow*, 118 Mass. 118. This lease was, then, a lease of the ground as well as the build-



ing, and it brings the case within the rule of the common law we have stated.

Judgment affirmed.

Minn. Gen Laws, 1883, ch. 100. Under the statute the lease is terminable at the option of the lessee: *Boston Block Co. v. Buftington*, 39 Minn. 385.

## f

### Assignment.

**The tenant may assign his estate for years, and the purchaser, upon entering the premises, becomes tenant of the original lessor.**

SANDERS *v.* PARTRIDGE,

Supreme Judicial Court of Massachusetts, 1871.

108 Mass. 556.

Sanders executed a lease to Jackson & Muzzy of premises in Boston for the term of ten years, for the annual rent of \$5,800, payable quarterly. Jackson & Muzzy afterward assigned "all their right, title, and interest in and to the within lease," to defendant Partridge, by a writing upon the original duly signed by them, but not under seal.

WELLS, J. To maintain an action for rent requires privity of contract or privity of estate. Either will suffice, if rent is due. .

When a lease is assigned, and the assignee enters under it, he becomes tenant of the lessor; he is bound by all the covenants of the lease which are not personal to the lessee, and he is liable to the lessor for all rents which accrue while he holds the estate. If there is no express covenant for the payment of rent, contained in the lease, then the covenant implied from the reservation of rent binds the lessee, and "runs with the land" so as to bind the assignee also: *Patten v. Deshon*, 1 Gray, 325; *Blake v. Sanderson*, 1 Gray, 332; *Croade v. Ingraham*, 13 Pick. 33; *Waldo v. Hall*, 14 Mass. 486; *Smith Landl. & Ten.* 287; 1 Washb. Real Prop. 326; 4 *Blytherwood's Conveyancing*, 388.

In the present case, the defendant entered into the enjoyment and control of the leased premises, under what purported to be an assignment of the lease. If that transaction operated in any manner to transfer to the defendant the entire leasehold estate, then he was in as assignee and may be held by the lessor for the rent which fell due while he so held the estate.

The defendant insists that the lease, being under seal, could be assigned only by an instrument under seal. This rule, applied to an assignment of the instrument itself, as a contract, is well settled at law: *Wood v. Partridge*, 11 Mass. 488; *Brewer v. Dyer*, 7 Cush. 337; *Bridgham v. Tileston*, 5 Allen, 371. If, therefore, a leasehold estate can be transferred only by an assignment of the instrument by which it was created, this objection must be held to be decisive.

But we do not so understand the law. A lease, by whatever form of instrument it is made, conveys to the lessee an estate or interest in the land. He may in turn convey to another any subordinate interest, or his entire estate, in any appropriate form, without regard to the form in which he acquired his own title. The leasehold estate may be transferred by devise; by sale on execution as a chattel: Gen. Sts. c. 133, § 49; or sale by an administrator as personal assets. In all these cases the purchaser becomes bound to the lessor to pay the rent and perform the covenants that run with the land, because the law imposes that obligation upon him by reason of his succession to the estate of the lessee. The same result follows from any transfer by the lessee of his entire estate. A seal is not essential to such transfer, even of a lease for more than seven years. No written instrument is necessary, except to satisfy the statute of frauds: Gen. Sts. c. 89, § 2. Even if the provisions of § 3 are applicable to the assignment of a lease, as well as to the creation of an estate by lease, a seal is only required to give it effect against parties other than the assignor, his heirs and devisees, and persons having actual notice thereof. The defendant cannot set it aside for the want of a seal.

The real question, then, is whether this instrument is suf-

ficient to satisfy the statute of frauds, as an assignment of an estate or interest in land.

It is indorsed upon and refers to the original lease; and the lease was delivered with it to the assignee. The description of the premises, the terms upon which they are to be held, and the intent to convey the estate are thus all made to appear by the writing. "All our right, title, and interest in and to the within lease" includes whatever leasehold estate the assignor might hold by virtue of that lease. If a seal had been attached, there would be no question of its operation to convey the estate of the assignor in the land described in the instrument referred to: *Patten v. Deshon*, 1 Gray, 325; *Blake v. Sanderson*, Ib. 332.

So far as it affects the sufficiency of the writing, under the statute of frauds, we do not see that it makes any difference that the instrument referred to is under seal, while the transfer is not. The reference is not merely to the instrument itself as the subject-matter of the assignment, but also to its contents as defining the subject-matter upon which the assignment is intended to operate.

We are of opinion that the writing relied on as an assignment in this case was sufficient to satisfy the statute of frauds, and that between the parties a seal was not rendered necessary to its operation as an assignment, either by reason of the length of the term or from the fact that the assignor acquired his title by a lease under seal: *Taylor Landl. & Ten.*, § 427, and cases cited in notes.

It was not necessary that the defendant should execute any writing, or make any express agreement. His obligation is implied by law from his acceptance of the assignment and his entering upon the enjoyment of the estate.

The report states such an acceptance and entry by the defendant. His employment of the former agent of his assignor to collect the rents for him was a sufficient entry. He is liable, then, for the rent which fell due July 1, 1870, for the preceding quarter, unless he had before that time ceased to hold the relation of tenant or assignee of the lease. The liability of

an assignee, upon covenants running with the land, extends only to such as are required to be performed while he holds that relation: *Patten v. Deshon*, 1 Gray, 325.

It is stated in the report that "on or about May 18, 1870, the defendant executed an assignment of said lease," by a writing not under seal, to one Newhall. If Newhall entered under that assignment, and the defendant ceased to collect the rents, control the premises or have any interest therein, before the end of the quarter, he would not be liable for any rent which should afterward fall due. But the case does not find that Newhall ever entered or collected the rents under his assignment, nor that the defendant at any time ceased to collect and receive the rents through his agent, and any inference to that effect would be inconsistent with the distinct statement of the report that upon the entry of the defendant under his assignment from the lessees "the rents were thereafter collected by said agent and paid over to the defendant."

Upon the report, we must assume that the defendant's evidence went no farther than to show a formal instrument of assignment without change of possession. That would not be sufficient to relieve the defendant from his liability as assignee of the lessees.

It is stated generally in the text-books, that an actual entry upon the demised premises, by an assignee of the lease, is not requisite in order to charge him with the performance of covenants running with the land. But we think this proposition will hold good only in respect of assignments by deed recorded and delivered, which are usually regarded as effecting a transfer, not only of title, but also of the legal possession. An assignment without deed, as of a chattel interest only, requires some act of entry or change of actual possession, to complete its operation and divest the assignor of responsibility which arises from the holding of the estate: *Taylor Landl. & Ten.*, §§ 449-451.

It was not necessary for the plaintiff to assent to the assignment, or recognize the assignee as his tenant, otherwise than by his suit for the rent.

It does not appear that the plaintiff had already received his rent from Jackson and Muzzy ; or that the defendant had any equitable defense as against them. The fact that Jackson and Muzzy remained liable for the rent upon their express covenants in the lease, notwithstanding their assignment, is sufficient explanation of the statement that the suit was brought with the plaintiff's consent, and at the request of Jackson and Muzzy.

The report shows that the defendant became responsible to the plaintiff as assignee of the lessees, and does not disclose any facts sufficient to defeat his action for the rent which thereafter became due upon the lease. According to the terms of the report, therefore, the plaintiff is to recover judgment for the full quarter's rent, \$1,450, and interest.

Judgment for the plaintiff accordingly.

### g

#### Sublease

Where the whole term is transferred the transaction amounts to an assignment, but where any part of the interest is retained the transaction is simply a sublease and the sublessee is not tenant of the original lessor.

#### DARTMOUTH COLLEGE v. CLOUGH,

Supreme Court of Judicature, New Hampshire, 1835.

8 N. H. 22.

RICHARDSON, C. J. We have attentively considered this case, and are of opinion that there must be judgment on the verdict.

The case stated in the declaration is that the plaintiffs, in the year 1808, made a lease to the Cliffords of certain land in Warren for nine hundred and ninety-nine years, reserving a certain yearly rent, and that in the year 1825 all the interest of the Cliffords in the premises came to the defendant by assignment ; and the plaintiffs claim to recover of the defendant,

as such assignee, all the rent reserved in the lease which became due between January 1, 1831, and January 1, 1834.

It was supposed by the counsel of the plaintiffs, at the trial, that the plea of *nil debet* was an admission of the lease from the plaintiffs to the Cliffords; and no evidence on that point was produced. But no case has been cited, nor have we found any case that gives the slightest countenance to the supposition that the plea was in law an admission of that lease. On the contrary, it is well settled that *nil debet* puts in issue the whole declaration. Even in cases where it is not a proper plea, if it be pleaded, and the plaintiff, instead of demurring, takes issue upon it, he will have to prove every allegation in his declaration: 1 Chitty's Pl. 478; 2 Starkie's Ev. 140, note (u) and 463. The plaintiffs then failed in this respect in a point essential to be proved in order to entitle them to a verdict.

But there are other defects in the case of these plaintiffs. In order to maintain debt or covenant for rent there must be either privity of contract or privity of estate between the plaintiff and defendant: Walker's Case, 3 Coke, 23.

Between the lessor and the lessee there is both privity of contract and privity of estate so long as the lessee retains the term. And the original lessee is liable to an action of covenant for the rent, although he may have assigned all his interest to some third person with the assent of the lessor. For even in that case the privity of contract continues between the lessor and the lessee: 1 Chitty's Pl. 36.

But if the lessee assign the term, with the assent of the lessor, after this, debt does not lie against the lessee: 1 Chitty's Pl. 106; 1 Saunders, 241, note 5; Auriol v. Mills, 4 D. & E. 98.

When the lessee has assigned to a third person his whole term, both debt and covenant lie against the assignee on the privity of estate: 2 East, 580; Howland v. Coffin, 12 Pick, 125; 9 Pick. 52.

And he who takes an assignment of the whole term, even by way of mortgage, is liable for the rent, although he may never

have entered and taken possession : *McMurphy v. Minot*, 4 N. H. R. 251 ; 5 Com. Law R. 72 ; *Turner v. Richardson*, 7 East, 335.

An assignee of the whole term is only liable for the rent while he continues in possession under the assignment. If he assigns over to another all his interest, he is not liable for the rent, although he may continue in possession : *Butler's N. P.* 159 ; *Tovey v. Pitcher*, *Carthew*, 177 ; *Taylor v. Shum*, 1 B. & P. 21 ; *Walker v. Reeves*, *Douglas*, 461, note ; *Chancellor v. Poole*, *Ib.* 735 ; *Woodfall's Landlord and Tenant*, 280, 281.

There is a material difference between an assignee of a term and an under-tenant.

He only is to be considered as an assignee of the term who takes the whole estate of the lessee in the land, or in some part of the land : 17 *Johnson*, 70 ; 3 *Wilson*, 234 ; *Woodfall*, 276–280 ; 11 *East*, 52 ; *Com. Dig. Debt, E. & F.* ; *Cro. James*, 411 ; *Cro. Eliz.* 633 ; 2 *Levintz*, 231.

When the lessee conveys to a third person the whole or a part of the land for a portion only of his term, such third person is not an assignee of the term, but an under-tenant : *Woodfall*, 276 and 287, 288.

There is no privity of contract or of estate between the original lessor and an under-tenant ; and the under-tenant is not liable to the original lessor in any form of action for rent : 1 *Chitty's Pl.* 36 ; *Douglas*, 183 ; *Woodfall*, 288.

In this case it was proved on the part of the plaintiffs that the defendant had been in possession of a part of the land, and that he had paid a part of the rent reserved on the lease from the plaintiffs to the Cliffords, for two years. This was *prima facie* evidence that he was an assignee as to part of the land. But it was only *prima facie* evidence. And there was nothing in the case that could preclude him from showing that he was only an under-tenant. His possession under his lease was notice to all the world of the nature of his interest. It was enough to make it the duty of the plaintiffs to inquire into the nature of his title before they brought their action.

As it was clearly shown that the defendant was a mere under-tenant, it is very certain that this action cannot be maintained.

Judgment on the verdict.

*Craig v. Summers*, 47 Minn. 189.

**But the sublessee may protect his possession by payment of the rent to the original lessor who has the right of entry for non-payment under the original lease.**

PECK *v.* INGERSOLL,

Court of Appeals, New York, 1852.

7 N. Y. 528.

GARDINER, J. The original lease between Mrs. Dunscombe and the plaintiffs contained a covenant of re-entry on the non-payment of rent by the lessees for ten days after it fell due. The jury have found that the ground-rent due to Mrs. Dunscombe by the defendants, the lessees' tenants; and the only question of any importance is whether they were justified in making such payment and entitled to have the amount applied in discharge of their rent due the plaintiffs.

It has been frequently decided upon the most obvious principles of justice that if an under-tenant is compelled to pay rent to the head landlord he may deduct it from the rent due to his immediate lessor; or if the sum paid exceeds that due the lessee the tenant may in an action of assumpsit for money paid to the use of the lessor, recover the excess: 1 *Smith's Leading Cases*, 4 Am. ed. 202, 3 and 4, marg. pp. 73, 4, 5, and cases there cited; 4 Term, 511. This privilege upon the part of the under-tenant exists if there be in the head landlord a legal right by the exercise of which the person who pays may be damnified unless he satisfies it: 1 *Leading Cases*, 203. It is not necessary that the head landlord should distrain or even demand the money or commence or threaten a suit. The right to enforce his claim in this way will make the



payment by the under-tenant compulsory within the principle of the decisions.

In this case the original lessor had, as we have seen, the right of re-entry. The under-tenant was authorized to protect his possession against the exercise of this right by paying the rent to the head landlord. Such a payment is not voluntary, and there is no question but that it was made by the defendants in good faith with an honest purpose to shield themselves from damage. I think the judgment of the Common Pleas should be affirmed.

Judgment affirmed.

Underletting is not a violation of the covenant not to assign: *Den v. Post*, 25 N. J. L. 285; *Jackson v. Harrison*, 17 Johns. 66; *Copland v. Parker*, 4 Mich. 660; *Leduke v. Barnett*, 47 Mich. 158. And an assignment is not a violation of the covenant not to sublet: *Taylor, L. & T.* 403; *Lynde v. Hough*, 27 Barb. 415. *Contra*: *Den v. Post*, 25 N. J. L. 285. But see: *Field v. Mills*, 33 N. J. L. 254.

## 2

### LEASE.

**A lease is a contract for the possession and profits of land for a determinate period, usually with a recompense of rent.**

SAWYER *v.* HANSON,

Supreme Judicial Court of Maine, 1845.

24 Me. 542.

TENNEY, J. This complaint is to obtain possession of one-half of a dwelling-house standing upon land not claimed as the property of either party, erected thereon by the owner's consent. It is alleged that the defendant, on the first day of June, 1844, having before that time had lawful and peaceable entry into the lands and tenements of the complainant, etc., "and whose estate in the premises was determined on the 29th day of May, 1844, then did and still does unlawfully refuse to quit the same; although the complainant avers that he gave notice in writing to said Hanson thirty days before the day of making this complaint to quit the premises."

The complainant relied upon a mortgage of the property described in the complaint from the defendant to one Smith, dated June 17, 1843, to secure a note of the same date payable in six months; Smith, on March 29, 1844, made a written assignment of said mortgage and note to one Forsaith, who, on May 28, 1844, assigned the same to the complainant. On June 1, 1844, the defendant was served with a notice in writing, signed by the complainant, to quit the premises immediately. A non-suit was directed by the District Court, to which exceptions were taken.

The statute referred to, under which this process is sought to be maintained, is applicable to three cases only: 1st. Where any unlawful and forcible entry has been made into any lands or tenements. 2d. Where there has been any unlawful and forcible detainer thereof. 3d. "Whenever a tenant, whose estate in the premises is determined, shall unlawfully refuse to quit the same, after thirty days' notice in writing, given by the lessor for that purpose." Rev. St. c. 128, § 2 and 5. The evidence presents no such forcible entry or detainer as to sustain the complaint: *Commonwealth v. Dudley*, 10 Mass. R. 403; *Saunders v. Robinson*, 5 Metc. 343. And we are not satisfied that the complaint can be maintained upon the evidence by virtue of the other provision. To bring the case within the fifth section, the relation of landlord and tenant must be shown to have existed, and the lease to have terminated; and a holding over by the lessee. The language clearly imports that the process, under this part of the statute, shall be in favor of a lessor or his assignee against a lessee or one holding under him. The determination of the estate referred to may be of a lease for years, or where a tenancy at will existed; it was not intended for those cases, where the title could be contested; but where the relation was such that the defendant was precluded from denying to the complainant the right of possession by his own contract.

A lease is defined to be a *contract* for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other. Any words, which

show the intention of the parties, that one shall divest himself of the possession, and the other shall come into it, whether they run in the form of license, covenant, or agreement, are of themselves sufficient: 4 Cruise's Dig. 67.

There is no allegation in the complaint, and no evidence shown by the exceptions, of any contract or agreement between the parties. The house having been the property of the defendant was mortgaged by him for security of his debt; according to the facts in the case, this mortgage had been foreclosed, and he divested of all estate in the premises; after which the interest of the mortgagee passed to the complainant by the assignment. The latter was the absolute owner of the house, it being personal property, and the defendant was in the occupation of the same; the complainant's title accrued two days before the notice to quit, given to the defendant; no relation of landlord and tenant can be implied or inferred from the facts reported.

Exceptions overruled.

Thompson v. Sanborn, 52 Mich. 141; Harlan v. Emery, 46 Iowa, 538; Ackerman v. Lyman, 20 Wis. 454; Collyer v. Collyer, 21 N. E. Rep. 114.

## B

### Covenants.

The covenants in a lease may be either expressed or implied, and those of a certain kind run with the land.

#### Express.

There are express covenants, as, one for a renewal of the lease.

RENOUD v. DASKAM,

Supreme Court of Errors, Connecticut, 1868.

34 Conn. 512.

In this case there was an express covenant for a renewal of the lease, and not making his request therefor until the first one had expired, and the landlord then declining to renew, the lessee files his bill in equity to enforce its execution.

PARK, J. This case depends upon the construction that shall be given to that part of the lease executed between these parties, which is as follows: "The said William Daskam also further covenanting and agreeing, that after the expiration of said term of five years, he will, if thereto desired by the said John W. Renoud, make and execute to the said Renoud a lease of the said premises for the further term of five years, upon the terms and conditions in this lease contained."

The petitioner claims that this provision of the lease gave him a reasonable time after the expiration of the five years in which to express his desire for another term; while the respondents insist that it required that the optional right should be exercised, on or before the termination of the five years. The lease is silent as to the time when the right may be exercised, and the petitioner infers that it exists after the five years expire, from the fact that the lessor covenants that he will execute another lease after that time, if thereto desired. But desired when? The lease does not answer the question. This covenant, construed literally, has reference solely to the act of the lessor, and not to the time when the desire for another term may be communicated to him. The constructions given to it by both parties harmonize with the language used, and we must therefore consider other parts of the lease and the surrounding circumstances in order to ascertain the meaning intended by the parties.

It can hardly be supposed that the lessor intended to grant an optional right to take the premises for another term, that might be exercised after the five years should expire, for the lessee might decide at the last moment to vacate the premises, and the lessor would then be left not only without a tenant, but at an unseasonable time to obtain one. He would thus run the hazard of losing the rent of his premises for a year, and that too when the right to this extent could be of no practical benefit to the lessee; for it is hardly to be supposed that, with the right, he would delay till the close of his term before he fully determined whether he would stay longer or not.

Again, if this right existed after the expiration of the five years, it existed during a reasonable time after that event; for when a right is given, and no time is prescribed for its exercise, a reasonable time is allowed. It follows then that the lease extended not only during the period of five years, but during the reasonable time within which the right might be exercised, should the lessee delay his election till the last moment; for it can hardly be claimed that the parties intended that the premises should be vacated during such time, when the lessee might elect for another term. Now the lease is for a period of five years, with an annual rent at a fixed sum payable quarterly. This provision of the lease is at war with the construction that the petitioner gives to the covenant in question. Its proper meaning is that the respondent will give another lease of the premises for another term of five years, to commence from and after the expiration of the first term, if thereto desired. The phrase "after the expiration of said term of five years," must have reference to the commencement of the second term, and not to the time when the lease should be given; for if it has reference to the giving of the lease, how long after shall it be given? and in that case when will the second term commence? No time is specified for either, and both would be left in doubt and uncertainty. The petitioner neglected to express his desire for another term on or before the expiration of the five years, and we think cannot now require that another lease should be given.

There is nothing in the petitioner's claim of waiver. This is not a case of forfeiture for the non-payment of rent, but a case where the petitioner has neglected to perform the condition on which his right to another term depended.

We advise the Superior Court to dismiss the petition.

**Implied.**

**There are implied covenants, as, that for quiet enjoyment.**

**DUNCKLEE v. WEBBER,**

**Supreme Judicial Court of Massachusetts, 1890.**

151 Mass. 408.

In this case an action was brought for breach of an implied covenant for quiet enjoyment in a written lease. The defendant had given a mortgage prior to the lease, and the assignee of the mortgage made entry for foreclosure and sold the premises.

C. ALLEN, J. The Court having ordered a verdict for the defendant, we have only to consider whether in any aspect of the case a verdict for the plaintiff would have been warranted.

1. There was sufficient evidence that Lincoln & Son had authority to let the premises for three years. One of the firm testified that the defendant "told us to let the house for \$800 a year, and the time was three years." Shortly after the letting (the time is not stated exactly, but the jury might have found it to be in the following month), the witness informed the defendant of the renting of the estate to the plaintiff, and of the collection of one month's rent. Afterward a settlement was had in which Lincoln & Son were allowed a commission on the stipulated rent for three years. Authority by parol was sufficient: *Shaw v. Nudd*, 8 Pick. 9; *Heard v. Pilley*, L. R. 4 Ch. 548.

2. The papers executed amounted to a present lease of the premises. No further or more formal lease was contemplated: *Shaw v. Farnsworth*, 108 Mass. 357; *McGrath v. Boston*, 103 Mass. 369.

3. The mode of signing the paper A was sufficient to bind the defendant. The contrary is not contended in the argument: *Goodenough v. Thayer*, 132 Mass. 152; *Amory v. Kanno-fsky*, 117 Mass. 351; *Gowen v. Klous*, 101 Mass. 449, 454.

4. There was an implied covenant for quiet enjoyment during the term. The papers A and B constituted a lease for three years. The rent was to be paid during that time. The

papers contain nothing to control the ordinary implication that the lessee shall have quiet enjoyment: *Ellis v. Welch*, 6 Mass. 246, 250; *Dexter v. Manley*, 4 Cush. 14, 24; *Foster v. Peyser*, 9 Cush. 242, 246; *O'Connor v. Daily*, 109 Mass. 235; *Mack v. Patchin*, 42 N. Y. 167; *Mostyn v. West Mostyn Coal and Iron Co.*, 1 C. P. D. 145, 152; *Bandy v. Cartwright*, 8 Exch. 913; *Hall v. London Brewery Co.*, 2 B. & S. 737.

5. There was evidence of a breach of this covenant. The defendant had given a prior mortgage, the assignee of which made an entry for foreclosure, and sold the premises under a power of sale contained in the mortgage, and the purchaser gave notice to the plaintiff to vacate the premises, with a threat of legal process to eject him. The plaintiff could not defend against this title and might properly yield to it without a suit: *King v. Bird*, 148 Mass. 572; *Carpenter v. Parker*, 3 C. B. N. S. 206.

6. The doctrine that an implied covenant of a life-tenant ceases with his life does not apply: *Adams v. Gibney*, 6 Bing. 656.

7. There was evidence of special damage. The plaintiff had to remove from the premises and to seek another place of residence. And he testified that the fair rental value of the premises was more than he was paying, and that property in that vicinity had recently risen in value.

New trial granted.

#### **Covenants that run with the land.**

**Some covenants run with the land; as, covenants in a lease to pay rent and taxes upon the demised premises.**

TRASK v. GRAHAM,  
Supreme Court of Minnesota, 1891.

47 Minn. 571.

VANDEBURGH, J. The record shows that the parties jointly entered into a lease with the St. Anthony Falls Water-Power Company, of the date of May 5, 1885, whereby they rented

from the company, by lease under seal, for the term of five years, from July 1, 1885, the premises in controversy. By the terms thereof the lessees, Trask & Graham, who were partners, agreed to pay as rent for the premises the sum of \$300 per annum, in quarterly installments; and also agreed to assume and pay all real-estate taxes levied on the leased premises during the term of the lease, beginning with the taxes for 1885. The lessees jointly, as partners, owned a saw-mill, situated upon the leased premises. On the 2d day of February, 1889, the defendant, Graham, in consideration of a contract for the sale of his interest and title in and to the leased premises and the saw-mill situated thereon, entered into between him and the plaintiff, Trask, did, by an instrument in writing under seal, at his request, duly sell and convey all his right, title, and interest in and to the same to one Whitmore, who represented the plaintiff, for the sum of \$5,500 consideration paid by the latter, and therein agreed to warrant and defend the title thereto against all lawful claims. For the purposes of this action it is understood that the sale and transfer is to be treated as an independent transaction, and wholly disconnected from other partnership business between the parties, or any accounting therefor; and plaintiff, it is admitted, stands in the shoes of Fairchild, as assignee, and succeeded to the sole possession of the premises under the lease as of the date of the transfer. The rent for the current quarter became due April 1 next after the date of the assignment; and the taxes for the year 1888 became payable on the 1st Monday of January, 1889, but not delinquent until June 1, but became and were a separate and fixed liability of both lessees then in possession as to each other. The plaintiff subsequently paid the rent for the whole quarter, and also the taxes for 1889, and by this action he seeks to recover from the defendant the amount of one-half the taxes for 1888, so paid by him, and also one-half of the rent that had accrued between January 1 and February 2, the date of the transfer and assignment to him, though not due till April 1 following.

As respects the relations of the assignee of a lease, the rule



is: "When a covenant relates to or is to operate upon a thing in being, parcel of the demise, the thing to be done by force of the covenant is, as it were, annexed to the thing demised, and goes with the land, binding the assignee to the performance, though not named; and the assignee, by accepting possession of the land, subjects himself to all the covenants that run with the land." Tayl. Landl. and Ten., § 437; Spencer's Case, 5 Rep. 16; Blake v. Sanderson, 1 Gray, 332. The foundation of this liability of the assignee is the privity of estate that exists between him and the lessor. The covenant to pay the rent and taxes runs with the land, and the plaintiff, Trask, under the assignment, assumed the liability for the rent and taxes that accrued and became due during his possession as assignee: Van Rensselaer v. Bonesteel, 24 Barb. 365; Post v. Kearney, 2 N. Y. 394. The assignee, being liable solely in privity of estate, is liable only for obligations maturing or breaches occurring while he holds the estate as assignee, and not for those which occurred before he became assignee or after he ceased to be such: Patten v. Deshon, 1 Gray, 325.

It follows from the application of these principles to this case that the assignee, Trask, was himself liable for the rent for the whole quarter within which he became assignee, the rent not having yet accrued, and which he must be held to have assumed. And the quarter's rent in such cases is not to be apportioned: Graves v. Porter, 11 Barb. 592. We are unable to see why the same rule does not apply as to the taxes. The covenant to pay was general, and would be satisfied if paid within the year, and so as to save the lessor harmless. The lessees would not be in default, at least till the taxes became delinquent, which would not be till June 1st. There had been no breach of the covenant to pay the taxes, and the assignee took the leasehold estate *cum onere* as to them also. The plaintiff, as assignee, was liable directly to the lessor upon the covenant to pay the taxes. There had been no previous breach of the covenant, and the plaintiff, as assignee, took the place of the lessee in respect to liability upon covenants not yet matured: Mason v. Smith, 131 Mass. 510. It must be presumed that the

contract was made in contemplation of the legal relations of the parties, and that the consideration was adjusted accordingly. If the plaintiff, as between them, was not to stand in the place of the defendant, and the defendant was to remain liable for the unpaid rent and taxes not yet due, it should have been so expressed in the contract.

Granting, then, that the lien of the taxes attached to the land January 1, the obligation to pay them under the lease had not yet matured, and there is no covenant against incumbrances or liens on the land. Defendant merely transfers his right, title, and interest in the mill and lease, and this is all the covenant of warranty applies to. He does not warrant the title to the land: *Sweet v. Brown*, 12 Met. 175. No breach of the covenant of warranty is shown or relied on: *Rawle, Cov.* (4th Ed.) 178, note.

Order reversed.

## b

### **Tenant estopped to deny Landlord's Title.**

**The tenant is estopped to deny his landlord's title, and the term may be forfeited by the lessee's disaffirmance of his landlord's rights therein.**

NEWMAN *v.* RUTTER,

Supreme Court of Pennsylvania, 1839.

8 Watts, 51.

Walter Newman conveyed certain lands to Moore in fee, reserving eight shillings rent on each lot, payable annually, and if the rent was not paid when due the grantor might distrain for rent, and the grantee also agreed to erect certain buildings thereon. Peter Newman, the plaintiff, by assignments became entitled to those rents. Plaintiff brings action of ejectment against defendant to recover the lots on the ground that the rents were not paid nor the buildings erected according to the said deed of conveyance.

ROGERS, J. One of the objections to the judgment of the Court of Common Pleas, is their answer to the fourth point. The Court instructed the jury, in answer to that point, that to

entitle the plaintiff to enter agreeably to the terms of the deed, it must appear not only that the rent was in arrear and unpaid, but that there was not sufficient personal property on the lot, liable to be distrained, to enable plaintiff effectually to compel payment of the rent by distress. By the terms of the deed it is stipulated that if the rent should be in arrear sixty days, the grantor might distrain; and if a sufficient distress should not be on the premises, that the owner of the rent might enter on the lots and repossess them, as though the deed had not been made. The deed must be construed according to the intention of the parties; and, to entitle the plaintiff to enter, it must appear not only that the rent was in arrear for the time specified, but that upon a distress being made by him, it was found that there was not sufficient property on the premises to pay it. In this point of view, therefore, the defendant, rather than the plaintiff, has reason to complain of the charge, as the Court put the case upon the fact, whether there was enough of property on the premises to answer the plaintiff's claim. If the plaintiff had pursued his remedy by distress, there were, if the witnesses are to be believed, at all times goods more than sufficient for that purpose.

But the plaintiff contends that the defendant denied his title, and that this denial amounts to a forfeiture, and that, therefore, he can maintain ejectment. A forfeiture may be incurred either by a breach of those conditions which are always implied and understood to be annexed to the estate; or those which may be agreed upon between the parties, and expressed in the lease. The lessor, having the *jus disposendi*, may annex whatever conditions he pleases, provided they be not illegal, unreasonable, or repugnant to the grant itself; and upon breach of these conditions may avoid the lease. Any act of the lessee, by which he disaffirms or impugns the title of his lessor, comes within the first class; for, to every lease the law tacitly annexes a condition that if the lessee do anything which may affect the interest of the lessor, the lease shall be void, and the lessor may re-enter. Every such act necessarily determines the relation of landlord and tenant;

since to claim under another, and at the same time to controvert his title; to affect to hold under a lease, and at the same time to destroy the interest out of which the lease arises; would be the most palpable inconsistency: Bar. on Leases, 119; Woodfal's Landlord and Tenant, 219. So where the tenant does an act which amounts to a disavowal of the title of the lessor, no notice to quit is necessary; as where the tenant has attorned to some other person or answered an application for rent by saying that his connection as tenant with the party applying has ceased: Bul. N. P. 96; Esp. N. P. 463. In such cases, as the tenant sets his landlord at defiance, the landlord may consider him either as his tenant, or as a trespasser. But these principles only apply where there is no dispute as to the person entitled to the rent; so where there was a refusal to pay rent to a devisee in a will which was contested, it is not such a disavowal of the title as will enable the devisee to treat the tenant as a trespasser, and to maintain ejectment without previous notice: Woodfal's Landlord and Tenant, 219, and the authorities there cited. These principles are usually applied to the relations which subsist between landlord and tenant on a demise for a term of years; and whether they are applicable to a grant of land in fee with the reservation of a rent charged on the land may admit of doubt, although no case has been cited, and I know of none, where it has been so applied. But however this may be, the doctrine does not hold where there is no denial of the title under which the defendant claims, but it is denied that the plaintiff is the person entitled to receive the rent, although he is the representative or devisee of the original grantor, or where, as in this case, the proportion of the rent which he owns is disputed. The plaintiff claims the entire rent, and the Court and jury have decided that he is entitled to a moiety only. It would, therefore, be a harsh application of the principle to decide that a defense which certainly has some plausibility about it, should work a forfeiture of the estate. Courts of law always lean against a forfeiture, and it is the province of a Court of Equity to relieve against it. Whenever a landlord

means to take advantage of a breach of covenant, so as that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the tenancy, and so operate as a waiver of the forfeiture, as distraining for the rent, or bringing an action for the payment of it, after the forfeiture has accrued, or accepting rent: Bul. N. P. 96; Woodfal, 227; Bar. on Leases, 226. For this reason the Court were right in admitting in evidence a receipt from the plaintiff to the defendant for ground-rent for the two lots for the year 1831. This evidence was pertinent, because the receipt of rent waives the forfeiture, if any such there was, for neglecting to erect the buildings on the lot, as provided for in the deed.

In deducing title to the ground-rents, plaintiff proved that the ground-rent in Newmanstown had been devised by the last will and testament of Walter Newman, to Henry Newman and David Newman, as joint devisees. This, of course, vested in Henry Newman, the plaintiff, a moiety only of the ground-rent reserved in the deeds. For the purpose of proving that he was entitled to the whole ground-rent charged on the *locus in quo*, he offered in evidence a deed from Magdalena Newman, administratrix of David Newman, deceased, one of the devisees of Walter Newman, to Christian Seibert, dated the 24th of August, 1786, for sixty-three acres of the tract of one hundred and twenty-eight acres, devised to Henry and David Newman, by Walter Newman, the said sixty-three acres including the one-half of Newmanstown; also a deed from Christian Seibert to Francis Seibert, for same, dated the 19th of April, 1793; also the will of Francis Seibert, devising the same sixty-three acres, including one-half of Newmanstown, to Elizabeth, wife of Peter Shoch, dated February 9, 1811, with parol proof that the said Francis Seibert, in the year 1805, or thereabouts, until the time of his death, and those claiming under him since his death, held and exercised exclusive ownership and occupation of the said sixty-three acres, including the one-half of Newmanstown, and that Henry Newman, the other devisee of Walter Newman, and those claiming under him, in the same time,

viz., from the year 1805, or thereabouts, to the present time, have exercised exclusive ownership on the remainder of the tract of one hundred and twenty-eight acres, including the other half of Newmanstown, and that the two lots for which this ejectment is brought, are located in that part of the said tract last mentioned ; with further parol proof that search has been made in the recorder's office in Dauphin and Lebanon Counties, for deed or agreement of partition of the premises, and none such has been found.

From the evidence here offered, it is plain that the ground-rent was not divided between the devisees by writ of partition ; so that the only question is, was such proof offered as will justify the jury in presuming a deed, grant, or mutual conveyance ? The evidence would have proved that the plaintiff had been in the enjoyment and receipt of the entire rent, charged on the premises, for a period of thirty years and upwards, and that they who deduce their title from David Newman, had received the whole ground-rent charged on this portion of the estate. A jury is required, or at least may be advised by a Court, to infer a grant of an incorporeal hereditament, after an adverse enjoyment for the space of twenty-one years ; and in *Hearn v. Lessee of Witman*, 6 Bin. 416, it is held, that what circumstance will justify the presumption of a deed is matter of law ; and that it is the duty of the Court to give an opinion whether the facts proved will justify the presumption. This presumption seems to have been adopted in analogy to the act of limitations, which makes an adverse enjoyment of twenty-one years a bar to an action of ejectment ; for as an adverse possession of that duration will give a possessory title to the land itself, it seems, also, to be reasonable that it should afford a presumption of right to a minor interest arising out of the land. The ground of presumption, in such cases, is the difficulty of accounting for the possession or enjoyment, without presuming a grant or other lawful conveyance. This is not an absolute presumption, but one that may be rebutted by accounting for the possession consistently with the title existing in another. Here we cannot account for the enjoyment and

receipt of the entire rent, without presuming a grant or some lawful conveyance from the one tenant in common to the other ; and for this reason we think the Court erred in excluding the evidence.

The Court were right in admitting the evidence of Job Pearson. The objection goes to his credit rather than to his competency.

Judgment reversed, and *venire de nova* awarded.

Allen *v.* Chatfield, 8 Minn. 435. A tenant is not estopped, as against a stranger, to deny his landlord's title : Cole *v.* Maxfield, 13 Minn. 235 ; St. Anthony Falls Water Power Co. *v.* Morrison, 12 Minn. 249. The tenant cannot claim that the title was in himself prior to the lease : Morrison *v.* Bassett, 26 Minn. 235 ; Sharpe *v.* Kelley, 5 Denio, 431 ; Vernam *v.* Smith, 15 N. Y. 327.

## C

### Rent.

**Rent is in effect the price to be paid for an estate for years or other leasehold interest, and must be certain or capable of being reduced to certainty, and must be paid though the buildings on the land leased be destroyed.**

FOWLER *v.* BOTT,

Supreme Judicial Court of Massachusetts, 1809.

6 Mass. 67.

An action of covenant for \$225, having accrued after the destruction by fire of the buildings leased.

SEWALL, J. [After stating the plaintiffs' demand, the several issues, and the verdict.] By a motion in arrest of judgment, this question, arising upon the defendants' third plea, is to be decided by the Court, viz. : Whether after a destruction by fire of the buildings demised, the lessors, without rebuilding, can recover their rent.

The supposed hardship of the case has been urged upon the attention of the Court as an argument for the defendants. The answer to this argument is, that a lease for years is a sale of the demised premises for the term ; and unless in the case of an

express stipulation for the purpose, the lessor does not insure the premises against inevitable accidents or any other deterioration. The rent is in effect the price, or purchase-money, to be paid for the ownership of the premises during the term; and their destruction, or any depreciation of their value, happening without the fault of the lessor, is no abatement of his price, but entirely the loss of the purchaser.

Independently, however, of the general reasoning, which has been gone into upon this question, the law applicable to the case at bar has been long settled. In the case of *Balfour v. Weston*, cited for the plaintiffs, the same question was made which arises in this case; but the Court of King's Bench refused to hear an argument upon it, being of opinion that the point had clearly been determined by the authorities; and on that occasion Justice BULLER refers to the opinion of Lord MANSFIELD in the case of *Pindar v. Ainsley & Rutter*, where the question occurred in an action of ejectment brought by the tenant in a lease for years against the landlord for the possession of some houses, which, having been burnt down, had been rebuilt by the landlord during the term; but after acts by the tenant, from which his abandonment of the lease was to be presumed. Lord MANSFIELD stated, as an established principle of law, that the consequence of the house being burned down is, that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during the whole of the term.

Nor is it correct to say that in cases of this nature the Courts of Equity in England afford relief. The cases cited in the argument for the defendants, as in point to that purpose, are noticed by Justice BULLER in the case of *Doe v. Sandham*, and he speaks of them as decisions on particular circumstances, and not upon any general principle or rule of equity.

Upon the whole, this established rule of law determines the construction and operation of the contract relied on by the plaintiffs in the case at bar. When words of the same import are used, as were employed in the contracts, upon which the decisions cited and referred to were made, the intentions of



the parties must be understood in conformity to those decisions, even admitting the supposed hardship of the case or severity of the demand. But even this objection seems inapplicable when we consider the lease as a bargain and sale for the term at an agreed price. When there is no covenant on the part of the lessor to insure against fire, or any engagement to repair the premises in that event, or any other casualty, by which they may be impaired or destroyed, the accident becomes the misfortune of the lessee, and he is not excused from his rent.

Judgment is not arrested, but must be entered according to the verdict.

Minn. Gen. Laws, 1833, ch. 100; *supra*, 37 Minn. 4. The rent of a quarry at a certain number of cents per perch for each and every perch quarried is a certain money rent: *Cross v. Tome*, 14 Md. 247.

#### Exception.

**If apartments in the upper story of a building, being the subject of a lease, are destroyed by casualty, the lessee is discharged from his covenant to pay rent.**

GRAVES *v.* BERDAN,

Court of Appeals, New York, 1863.

26 N. Y. 498.

Rooms in the second story of a building were leased to the defendant for five years. The building was destroyed by fire. There was no covenant by the landlord or tenant to rebuild. The action is for rent for a quarter subsequent to the fire.

ROSEKRANS, J. The opinion delivered by Justice EMOTT in this case, in the Supreme Court, is a correct exposition of the law applicable to it, and for the reasons stated therein, the judgment should be affirmed. The case of *Stockwell v. Hunter*, 11 Metc. 448, may be added to the authorities cited by Justice EMOTT to show that a lease of basement rooms or chambers, in a building of several stories in height, without any stipulation, by the lessor or lessee, for rebuilding, in case of fire or

other casualties, gives the lessee no interest in the land upon which the building stands, and that if the whole building is destroyed by fire, the lessee's interest in the demised rooms is terminated, and the lessor may, after the destruction of the building, enter upon the soil and rebuild upon the ruins of the former edifice.

It may be added that at common law, where the interest of the lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned. In Rolle's Abridgment, 236, it is said that if the sea break in and overflow a part of the demised premises, the rent shall be apportioned for though the soil remains to the tenant, yet as the sea is open to every one, he has no exclusive right to fish there. A distinction is taken between an overflow of the land by the sea, and fresh water, because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and in that case the rent will not be apportioned. In the latter case the tenant has a beneficial enjoyment, to some extent, of the demised premises, but in the former he has none, and if the use be entirely destroyed and lost, it is reasonable that the rent should be abated, because the title to the rent is founded on the presumption that the tenant can enjoy the demised premises during the term: *Com. Land. and Ten.* 218; *Gilb. on Rents*, 182.

Where the lessee takes an interest in the soil upon which a building stands, if the building is destroyed by fire, he may use the land upon which it stood, beneficially, to some extent, without the building, or he may rebuild the edifice; but where he takes no interest in the soil, as in the case of a demise of a basement, or of upper rooms in the building, he cannot enjoy the premises in any manner after the destruction of the building, nor can he rebuild the edifice. He cannot have the exclusive enjoyment of the vacant space formerly occupied by the demised rooms. The effect of the destruction of the building, in such a case, is analogous to the effect of the destruction of demised premises by the encroachments of the sea, mentioned

in Rolle's Abridgment; and the established rule for the abatement or apportionment of the rent, should be applied in the former as well as in the latter case. The same reason exists for its application in both cases.

But even if the lessee's interest in the demised apartment, in a case like this, was not terminated by the total destruction of the building, it may be doubted whether the lessee could recover rent so long as he failed to give to the demised upper rooms the support necessary to them for special enjoyment. The rule seems to be settled in England, that where a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property so that it may be able to bear such weight. The proprietor of the ground story is obliged to uphold it for the support of the upper story: *Humphrey v. Brogden*, 12 Q. B. 739; s. c., 1 Eng. Law and Eq. 241; *Rowbotham v. Wilson*, 36 Ib. 236; *Harris v. Roberts*, 6 El. & Br. 643; s. c., 7 Ib. 625. In the case last cited the duty of such support is recognized as a general common-law right. In a lease of upper rooms by the owner of the entire building, a covenant should be implied on the part of the lessor to give such support to the upper rooms as is necessary for their beneficial enjoyment. It has been decided in this Court that the statute forbidding the implication of covenants in conveyances of real estate, does not apply to leases for years: *Mayor of New York v. Maybee*, 3 Kern. 151; *Vernam v. Smith*, 15 N. Y. 332, 333.

The judgment should be affirmed.

*Contra*: *Helburn v. Mofford*, 7 Bush (Ky.), 169. The reservation of rent is not essential to the creation of an estate for years. A lease may be for money paid: *Osborne v. Humphrey*, 7 Conn. 340.

## d

**Termination—By Lapse of Time.**

**The term expires by efflux of time on the last day thereof without notice to quit.**

BEDFORD *v.* McELHERRON,  
Supreme Court of Pennsylvania, 1815.

2 S. & R. 49.

Plaintiff leased land to defendant for a term of four years, reserving the annual rent of a turkey on the 23d day of December in each and every year if required. The plaintiff suffered the defendant to remain in possession seventeen years after the expiration of the lease, and the only question is whether the plaintiff must give defendant notice to quit before he can maintain an action of ejectment.

TILGHMAN, C. J. Where a lease is made for a year, and so from year to year as long as both parties please, there must be notice to quit in due time before the end of the year; otherwise the law implies a new lease for a year. So where a lease is made to one to hold, during the pleasure of the lessor, there must be due notice to quit; because it would be unreasonable that a man that has gone to the expense of cultivating land and making preparations for a crop, while his estate was uncertain, should be turned off at a moment's warning. But where the lease is to expire at a certain time the law is different, because each party knows what he has to trust to. There can be no occasion to give notice to quit where the lessee has agreed to quit at a certain time. In the present case the lessor might have maintained an ejectment at the end of the lease. But there is no evidence that the lessor required the possession at the end of the lease. On the contrary, he permitted the lessee to retain possession for seventeen years afterward. From this, I think, it may be fairly presumed that the defendant retained the possession with the consent of the plaintiff; and if so, he was tenant at will at least, or perhaps it may be more reasonably inferred that he remained tenant from year to year at the same rent, which was reserved by the written lease for four years.

But whether he was tenant at will or from year to year is immaterial, because in both cases notice to quit was necessary. The charge of the president of the Court of Common Pleas was correct, therefore, and the judgment should be affirmed.

Judgment affirmed.

2 Taylor, L. & T. 465; *Moshier v. Reding*, 12 Maine, 478; *Pierson v. Turner*, 2 Ind. 123; *Young v. Smith*, 28 Mo. 65; *Clapp v. Paine*, 18 Maine, 264; *Ellis v. Paige*, 1 Pick. 43; *Cobb v. Stokes*, 8 East, 358.

#### By Agreement.

**This estate may be terminated also by mutual agreement of the parties.**

NELSON *v.* THOMPSON,  
Supreme Court of Minnesota, 1877.

23 Minn. 508.

CORNELL, J. The point of alleged variance between the complaint and the evidence is one that, had it been made in the District Court, might, and in the rightful exercise of its discretion ought, upon motion, to have been obviated. It comes too late, therefore, to be considered on this appeal: *Babcock v. Sanborn*, 3 Minn. 141; *Washburn v. Winslow*, 16 Minn. 33.

Under the testimony two separate and distinct issues were raised, the determination of either of which in defendants' favor would, as it is claimed, have entitled them to a verdict upon the whole case. Upon the submission of the case to the jury the Court, in its charge, confined them to the consideration of one of these issues alone, and the evidence applicable thereto, thereby wholly withdrawing the other from their consideration. Under this ruling a verdict was rendered in favor of the defendants, which, on motion of plaintiff, was set aside because of an erroneous instruction in reference to the issue thus submitted to and passed upon by the jury. Conceding the correctness of the decision upon the motion on this point,

it is contended that the verdict ought not to have been set aside, because, upon the whole evidence, the defendants were entitled to a verdict upon the other issue. As to this issue, viewed in the most favorable light possible for defendants, its determination depended upon a disputed fact, concerning which there was conflicting evidence, sufficient at least to raise a reasonable doubt as to what might legally have been the finding of the jury thereon. It cannot, therefore, be assumed by this Court that the verdict upon this issue would have been for the defendants, in case it had been properly submitted to the jury, and the decision of the District Court in awarding a new trial cannot be overruled upon this ground.

The remaining question relates to the alleged surrender of defendants' lease and their estate thereunder. Upon the testimony, the fact is undisputed that defendant Thompson, having removed from the premises on February 10, went to plaintiff's agent, Farrington, for the purpose of paying the rent to that time and surrendering up the premises to plaintiff. In reference to what then took place she testifies: "I told Mr. Farrington that I came to give him the key and pay the rent. He said he would take the key, but he should hold me for the rent; and we had considerable conversation that day. I told him I did not see how he could, as I went out in good faith. He told me he would hold me for the rent of those premises. I had the key at the time. Nothing else occurred, only I paid him the money. I figured it up and said it was \$33.30, and he said it was \$33.33. He may have said more than once that he would hold me for the rent. I think he said it twice."

In reference to the same transaction, Farrington testifies: "She came and tendered me the money up to that time; I received it. She also tendered me the key; I declined to take it, except conditionally. I said to Mrs. Thompson: 'I can't take the key unless you agree—you and your associates—to make good the rent of the unoccupied premises until I have an opportunity of renting them.' I said I would expect to hold them for the rent while the house was unoccupied. She replied to that that she had not means to pay it, and that the

other parties would have to pay it. I took the key on those conditions."

Upon this testimony—and there is nothing in the case in the least conflicting with it—the District Court was right in assuming, as a fact uncontroverted upon the evidence, that the landlord had no intention of accepting a surrender and terminating the tenancy at that time. He received the key only conditionally, and with the express declaration that he should still continue to hold the lessees for the rent upon the covenant in their lease. There can be no pretense, then, of any surrender by virtue of an agreement, and this necessarily implies an intentional and express assent on the part of the lessor to the termination of the lease. Neither can any surrender by operation of law be predicated upon these facts. That, as said by PARKE, B., in *Lyon v. Reed*, 13 M. & W. 285, 306, can only take place "where the owner of a particular estate has been a party to some act, the validity of which he is by law afterward estopped from disputing, and which would not be valid if his particular estate had continued to exist." Such would be the case of a lessor taking unqualified possession of demised premises, and dealing with them in a way wholly inconsistent with the continuance of an already existing and unexpired term. In such a case, as against the lessor, the law, upon the principle of estoppel, implies a mutual agreement between him and his lessee, whereby the possession of the premises has been abandoned by the latter, and resumed by the former, in pursuance of such agreement.

The act of the plaintiff in the case at bar in receiving the key, subject to the condition stated as to the continued payment of rent, was not of this character. It distinctly recognizes the continued existence of the term, and is in no way inconsistent with it. If it be conceded that the renting to Lewis, on April 1, was of that character, there was no surrender by operation of law, on account of that act, until that time, and plaintiff would be entitled to his rent, under the lease until that time.

Order affirmed.

## Or by Operation of Law.

SMITH *v.* PENDERGAST,  
Supreme Court of Minnesota, 1879.

26 Minn. 318.

BERRY, J. Moore, owning and being in possession of certain premises, demised the same, by lease under seal, for the term of one year from September 7, 1871, to the firm of Howard & Carpenter, composed of John R. Howard and Ira M. Carpenter. Thereupon the firm went into possession, and performed all the covenants and conditions to be performed on their part. Pursuant to one of its provisions, the lease was renewed for an additional term of four years, and under the renewal the lessees continued in possession, and fully performed on their part, except as hereinafter stated. On November 1, 1873, Moore, the lessor, conveyed the demised premises to the plaintiff, and transferred to him all his rights in and under the lease.

At the time of the execution of the lease there was a two-story building upon the demised premises, the second story of which was used as a tin-shop, access to which was had by an outside flight of stairs, upon the demised premises, and on the south side of the building. This flight of stairs furnished the only public means of access to the tin-shop. In addition to the site of the building mentioned the lease demised another portion of the lot upon which the building was situated, which portion was well adapted as a place of deposit for bulky goods, such as agricultural machinery. In the latter part of September, 1875, the plaintiff entered upon this portion of the lot, and during October following removed the stairs, and there erected a building which he has ever since occupied as a bank. At the same time, plaintiff put up a flight of stairs at the rear of the building, so as to afford access to the second story and to the tin-shop, and subsequently, at the request of one of the defendants, cut a doorway in the rear part of the first story of the building, and put in a door, so as to afford



the lessees more convenient access to the stairs which he had erected.

Previous to plaintiff's entry upon the above-mentioned portion of lot 7, he informed Howard (of the firm of Howard & Carpenter) of his desire to make such entry and to make the erection and improvements aforesaid, promising Howard that if he would consent to the same he would obtain for him another lot upon which to store and deposit goods or agricultural machinery, in case he desired him to do so. Howard made no objection then or at any other time to plaintiff's acts or proceedings in the matter, but permitted him to go on with his entry and improvements, and by his (Howard's) conduct led the plaintiff to believe that it was entirely satisfactory to him.

On November 8, 1875, Howard & Carpenter assigned all their rights under the lease to John R. Howard, who retained possession of the demised premises, except as above stated, until January 27, 1876. On that day, and after the plaintiff had made the entry and all the erections and improvements aforesaid, Howard assigned all his rights under the lease to the defendants. They thereupon entered into possession of the demised premises, except the portion entered upon by plaintiff, as aforesaid, and occupied and used the same, under the lease, from said 27th day of January up to September 7, 1876, inclusive, when they surrendered possession to the plaintiff. Defendants paid the rents reserved in the lease which accrued up to March 7, 1876. The last payment was made by them on March 9, 1876, and they have paid no rent for their use and occupation of the premises since March 7, 1876. No dissatisfaction was ever expressed to plaintiff on account of his entry and improvements until April, 1876, and then by the defendants only, and no damages were claimed before that time on account thereof.

Upon the state of facts summarized above the Court below found as conclusions of law: First, that the acts and conduct of the lessees were equivalent to consent to the plaintiff's entry and improvements aforesaid; second, that the plaintiff was

entitled to judgment against the defendants for rent, according to the terms of the lease, at the rate of \$50 per month, for the six months between March 7 and September 7, 1876, with interest.

We have no doubt of the correctness of these conclusions. The first, however, does not go as far as the findings of fact would have justified the Court in going, nor as far as it ought to go. We are of opinion that the facts found by the Court make out a case of a surrender to the plaintiff, by operation of law, of that part of the demised premises entered upon and occupied by him as aforesaid. The case appears to us fully to fall within the doctrine laid down by Baron PARKE in *Lyon v. Reed*, 13 Mees. & Wels. 285, a case cited and applied by this Court in *Nelson v. Thompson*, 23 Minn. 508. In considering what is meant by a surrender by operation of law, Baron PARKE says: "This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterward estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender, Thus, if lessee for years accept a new lease from his lessor he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former." After giving some other instances he adds: "It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted—namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist."

Now it is found, in effect, that the plaintiff's entry upon, and occupation and improvement of, the before-mentioned portion of the demised premises, was with the knowledge and assent of the then lessees, Howard & Carpenter. The plaintiff could not lawfully have made the entry and im-

provements, or have gone into and continued the occupation, if, as respected the portion so entered upon and occupied, the leasehold estate continued to exist. The validity of the plaintiff's entry and occupation the lessees were, therefore, estopped to dispute. The plaintiff acted and made expenditures upon the basis of the assent of the lessees, and to permit them to repudiate their assent would prejudice the plaintiff, and work a fraud upon him. See *Pence v. Arbuckle*, 22 Minn. 417.

As respects the then lessees, Howard & Carpenter, we think the facts found clearly show a surrender of that portion of the demised premises entered upon by the plaintiff. Howard was one of the firm of Howard & Carpenter, and, through the firm's assignment to him, he succeeded to the firm's rights only. By Howard's assignment to the defendants, made after the plaintiff's entry and improvements, and after his occupation, the defendants acquired no more rights than Howard had; and the surrender was as effectual and operative as against them as against Howard or Howard & Carpenter. This disposes of the defendants' position that the plaintiff cannot recover the rent reserved in the lease because he has evicted the defendants from a portion of the demised premises. There has been a surrender of a portion of the demised premises by operation of law, and this satisfies the requirements of the statute found in Gen. St. 1878, c. 41, § 10.

It is further claimed by the defendants that the plaintiff is not entitled to recover the entire rent reserved, because they are deprived of the enjoyment of a portion of the demised premises. If it were found that, on account of this deprivation, taking all the accompanying facts and the circumstances into consideration, the value of the use of the demised premises was impaired, it is possible that this point might present some difficulty. But it is not so found, and there is, therefore, no ground upon which the rent can be reduced.

It is urged that the Court below erred in not distinctly and specifically finding upon the question, whether and how much

the rental value of the demised premises was diminished by the deprivation spoken of. The answer to this is that, if the finding was defective in these respects, the Court below should have been moved to perfect it. Otherwise, any such objection to it is taken as waived. These are all the points which appear to us to require special consideration, and the result is that the judgment is affirmed.

*Cahill v. Eastman*, 18 Minn. 324; *Dayton v. Craik*, 26 Minn. 133; *Lucy v. Wilkins*, 33 Minn. 441; *Chadbourn v. Rahilly*, 34 Minn. 346.

## B

### ESTATES FROM YEAR TO YEAR.

**When one occupies land by permission of the owner, without any definite time therefor being fixed, but the reservation of rent or other circumstances indicate an agreement for an annual holding, an estate from year to year is thereby created.**

#### a

#### **Rent Reserved.**

*HUNTER v. FROST*,

Supreme Court of Minnesota, 1891.

47 Minn. 1.

*MITCHELL, J.* The plaintiff leased to defendant a tenement for the term of thirteen months from April 1, 1888, for an agreed rent of \$540 per annum, payable in equal installments of \$45, in advance, on the first day of each month. The defendant entered and occupied the premises during the term, and after its expiration held over and continued in possession, and paid rent to the plaintiff, in accordance with the terms of the lease, up to and including the month of November, 1889. Several days prior to October 30, 1889, the defendant served

upon plaintiff written notice that he would vacate the premises on November 30 next ensuing. In pursuance of this notice he vacated them, and has not since that time occupied them or paid rent. This action is to recover rent from December 1, 1889, to May 1, 1890.

It is not questioned but that at common law the defendant, by holding over after the end of the term without any new agreement, and paying rent according to the terms of the prior tenancy, which was accepted by the plaintiff, became a tenant from year to year, and that this tenancy could not be terminated by either party, except upon due notice (at common law, six months), terminating at the end of the first or any subsequent year (May 1). But defendant's contention is that tenancies from year to year have been abolished by the statutes of this State, and converted into tenancies at will, which may be terminated at any time by either party, by giving the length of notice provided by Gen. St. 1878, c. 75, § 40, which, in this case, would be one month, the rent reserved being payable monthly. While tenancies from year to year are the creation of judicial decisions, based upon principles of policy and justice, out of what were anciently tenancies strictly at will, terminable at any time by either party without notice, yet such tenancies had become so well established and so fully recognized in the common law that it would naturally be supposed that, if it had been intended to convert them into mere tenancies at will, it would have been done by express and clear language, and not left to mere inference or implication. We think we are safe in saying that, although our statutes bearing upon the subject have always been the same as now, it has never been the understanding of the bar of the State that they had introduced any such radical change in the law as that now contended for. Evidently this Court, in considering the cases of *Gardner v. County of Dakota*, 21 Minn. 33, 38, and *Dayton v. Craik*, 26 Minn. 133 (1 N. W. Rep. 813), assumed that tenancies from year to year still existed in this State. It was squarely so decided in *Smith v. Bell*, 44 Minn. 524 (47 N. W. Rep. 263), although the question was not

very fully argued in that case, and we would not feel bound to follow it if fully convinced that it was wrong.

Counsel for defendant does not claim that there is any express provision of statute abolishing such tenancies, but he relies on certain provisions which he claims effect that result by implication. The first is Gen. St. 1878, c. 45, § 1, dividing estates in land into estates of inheritance, estates for life, estates for years, estates at will and by sufferance; the argument being that, as estates from year to year are not named, therefore they are impliedly abolished. The next is Gen. St. 1878, c. 75, § 40, which provides that all estates at will may be determined by either party by three months' notice in writing for that purpose given to the other party, and, when the rent reserved is payable at periods of less than three months, the term of such notice shall be sufficient if it is equal to the interval between the times of payment. It is argued that by this the Legislature intended to provide for the termination of all estates which did not terminate themselves without notice, and made provision for all the estates which it recognized, which did not terminate themselves, to wit, estates at will. Reference is also made to Gen. St. 1878, c. 84, § 11, governing summary proceedings for the recovery of possession by a landlord. It is said that this was evidently intended to give a landlord a summary remedy whenever the relation of landlord exists; but, as the statute only refers to two classes of cases in which the remedy may be employed when the tenant is not in arrears of rent, to wit: when the tenant holds over after the termination of the time for which the premises were demised, and where a tenant at will holds over after the determination of any such estate by notice to quit; therefore, if tenancies from year to year still exist, the tenant in such cases could only be evicted by an action of ejectment.

It seems to us that counsel has been led into error by failing to duly consider the state of the common law when the statutes were passed, and by assuming that, when they speak of tenancies at will, they refer exclusively to tenancies strictly at

will—that is, those which, but for the statute in reference to notices to quit, would have been terminable at any time by either party without notice. It was determined very anciently by the common law, upon principles of justice and policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his will in a wanton manner, and contrary to equity and good faith, but that they could only be terminated by notice for a longer or shorter period, depending usually upon the nature of the original demise. At first there was no other rule but that the notice should be a reasonable one. Because of the uncertainty of this rule, the Courts early adopted, as far as possible, some fixed period as being reasonable. In those tenancies which, from the nature of the original demise, they construed to be tenancies from year to year, the Courts adopted six months as a reasonable notice, holding that such tenancies could only be determined by a notice of at least six months, *terminating at the expiration of the first or any succeeding year*. And in those cases which did not come within the class of tenancies from year to year, because by implication for some definite period less than a year, the rule was generally adopted that the time of notice should be governed by the length of time specified as the interval between the times of payment of rent, and should be equal to one of these intervals, *and must end at the expiration thereof*. The result was that at common law estates at will, in the strict sense, became almost extinguished at a very early date, under the operation of judicial decisions. Indeed, it would have been difficult to conceive of an instance of such a tenancy, except where created by the express contract of the parties to that effect. But they still remained substantially tenancies at will, except that such will could not be determined by either party without due notice to quit. The enumeration or classification of estates adopted by our statutes is but declaratory of that found in all writers on the common law, even after the doctrine of tenancies from year to year had been fully established by the decisions of the Courts. Estates in land, less than freehold, have always been

classified as of three sorts: (1) Estates for years; (2) estates at will; (3) estates by sufferance: 2 Bl. Comm. 139. This classification was first incorporated in statutory form in the old Revised Statutes of New York, and from them borrowed successively by Michigan and Wisconsin, and perhaps other States; but in none of them was it ever held, or even suggested, that the statute affected or in any way changed the common law as to tenancies from year to year. Did the statutory enumeration necessarily exclude tenancies from year to year, there would be much force in defendant's argument. But, so far from this being the case, they may be included in either estates for years or estates at will, or both, as they possess many of the qualities of each. A tenancy from year to year, though indeterminate as to duration until notice given, has most of the qualities and incidents of a term for years, and, when notice has been given, the term is as much fixed for a definite period as any term for years. A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. Such an estate is not determined by the death of either lessor or lessee; it is assignable and demisable, and may be pleaded as a term. But, although it has many of the qualities of a term for years, yet it is, as already remarked, substantially a tenancy at will, except that such will cannot be determined by either party without due notice to quit, terminating at the end of a year: 1 Woodf. Landl. and Ten. 219. For purposes of notice to quit, it is a general tenancy at will: Tayl. Landl. and Ten., § 467, and cases cited. And for purposes of general classification it is treated as a species of tenancy at will, and as properly so as are those tenancies which by implication are held to be for some period less than a year, as from quarter to quarter, or from month to month, where notice to quit is also necessary in order to terminate them; the only difference being as to the length of the notice and the time it should terminate.

Notwithstanding what was decided in *Smith v. Bell*, *supra*,



we have come to the conclusion, upon fuller examination, that the provisions of chapter 75, § 40, in relation to notices to quit, were intended to apply to all estates which do not terminate themselves without notice, and that for the purposes of such notices a tenancy from year to year is a tenancy at will. In some of the cases cited by plaintiff, it was held, as in *Smith v. Bell*, that similar statutes apply only to the notice required to terminate a tenancy at will, and have no application to a tenancy from year to year. In one of these cases it is said that the purpose of the statute was to give tenants at will the right to the notice therein specified before they could be dispossessed, whereas, before such enactment, they were not entitled to any notice whatever; in other words, that the statute was to give the tenant the right to notice in cases which, but for the statute, would have been tenancies strictly at will. It seems to us that, in placing this construction upon such statutes, the Courts have entirely overlooked the fact that tenancies strictly at will had already practically ceased to exist, except where the parties had expressly contracted that the tenancy might be terminated at any time without notice; and as in such cases the contract of the parties, and not the statute, would control, the result would be that such a construction would render the statute meaningless. We have, therefore, reached the conclusion that the description of estate commonly known as a tenancy from year to year is comprehended in the term "estates at will," as used in chapter 75, § 40. But this section has reference only to the *length* of notice, and does not assume to otherwise change or affect the nature of the tenancy, or the existing rules of law as to when the notice should terminate. For example, where, by implication, the tenancy is from quarter to quarter or from month to month, the rent being payable quarterly or monthly, the notice must still terminate with the quarter or month; and, where the tenancy is from year to year, the notice must terminate with a year, although the length of it may now be shorter than six months, as formerly required at common law. Consequently, while the notice given by defendant in this case was sufficient as to length,

yet it was wholly ineffectual, because not terminating at the end of a year.

There is nothing in the point that there can be no such thing as a tenancy from year to year in this State because of the statute of frauds: Gen. St. 1878, c. 41, § 10. The Courts have uniformly held that tenancies from year to year were not affected by such a statute. The cases from Massachusetts and Maine are not in point, because expressly placed upon their statutes providing that an estate or interest in land, created without an instrument in writing, "shall have the force and effect of *an estate at will only*."

Judgment affirmed.

WILLIAMS, R. P. 389; Taylor, L. & T. 55; 4 Kent Comm. 114; Schuyler v. Smith, 51 N. Y. 309; Sullivan v. Cary, 17 Cal. 80; Jackson v. Salmon, 4 Wend. 327; Prickett v. Ritter, 16 Ill. 96; Botsford v. Darling, 47 N. Y. 666; Hanchet v. Whitney, 1 Vt. 312; Hunt v. Morton, 18 Ill. 75; Lounsbery v. Snyder, 31 N. Y. 514; Johnson v. Albertson, 51 Minn. 333; Brant v. Vincent, 59 N. W. Rep. 169; Rogers v. Brown, 58 N. W. Rep. 981; Huntington v. Parkhurst, 87 Mich. 38 (49 N. W. Rep. 597); Unglish v. Marvin, 128 N. Y. 380 (28 N. E. Rep. 634).

## b

### No Specific Rent Reserved.

HUNT v. MORTON,

Supreme Court of Illinois, 1856.

18 Ill. 75.

CATON, J. The whole of the merits of this case resolve themselves into the inquiry, whether this was a tenancy at will, or from year to year. The father of the defendant was admitted into the possession of the premises in the fall of 1850, by an agent of the plaintiff, without any specific contract for the payment of rent, with the agreement that he might remain till spring. He continued in the possession of the premises with his family, of which the defendant was a member, during the year 1851, and that season cultivated and

raised a crop on the land. Sometime during the winter of 1851-52, the father of the defendant left the premises in the possession of the defendant, who cultivated and raised a crop upon them in 1852. At what particular time the defendant succeeded to the possession of his father is not very satisfactorily shown by the testimony, but there is no doubt that he did obtain the possession through his father; and so far as the rights of the plaintiff are concerned, it was but the continuance of the original possession taken by his father in the fall of 1850, and the case should be considered the same as if the father had continued and was still in possession. There never was, strictly speaking, a tenancy at will. By agreement the first tenancy was to continue till the spring of 1851, with some encouragement from the plaintiff's agent, that the tenancy might continue for the year; or, at least, so long as would enable the tenant to raise a crop on the land, which would have taken the balance of the year. Without any new agreement, and without objection from the landlord or his agent, the tenant continued his possession for two years and over, and cultivated the land in crops for both seasons. This certainly created a tenancy from year to year, if it is possible for such a tenancy to be created without an express agreement to that effect, which I presume will not be controverted.

I shall not stop to refer to the authorities, showing that a tenant from year to year is entitled to six months' notice prior to the expiration of the year, in order to terminate the tenancy. They are sufficiently referred to in the case of *Prickett v. Ritter*, 16 Ill. R. 96; although that was of a monthly and not of a yearly tenancy. We hold such to be the law in this State, as it has been held in England and most of the States of the Union. Here no notice to quit, as required by law to terminate the tenancy was given; consequently, that tenancy still continued, when this action was commenced. Such being the case, we cannot hold that the plaintiff was injured by the decision of the Court withdrawing the evidence from the jury. The nature of the tenancy was a question of law to be decided by the Court. It being a tenancy from year to year, which

still continued for want of a notice to terminate it, of which there was no pretense, all other testimony became immaterial, for it was impossible, in the present state of the case, for the plaintiff to recover.

The judgment must be affirmed.

Judgment affirmed.

C

**Termination.**

**Either party may terminate this lease by due notice.**

STEFFENS *v.* EARL,

Supreme Court of New Jersey, 1878.

40 N. J. L. 128.

E. leased certain premises to S. by the month, to commence on the first day of May, at the monthly rent of \$10. On the 29th day of June following, E. gave written notice to S. to vacate the premises on the first day of the next August. S. refused to vacate the premises, and E. brings this action to eject him and to recover judgment.

REED, J. The first objection urged against the judgment in this case is relative to the statement in the affidavit of the existence of the tenure. The statement in the affidavit is that "deponent leased said premises to said Steffens by the month, to commence on the 1st of May last, at the monthly rent of \$10." It is said that this is merely the statement of a conclusion of law, and not a statement of such facts as will disclose to the Court the existence of a tenancy, as a legal conclusion. In support of this position, the case of *Fowler v. Roe*, 1 Dutcher, 549, is adduced. In that case the statement in the affidavit was that the defendant was "her tenant," and held over premises "heretofore leased to him;" and it was held insufficient, because it was the claimant's conclusions from facts not disclosed. I do not perceive in what manner this affidavit is invalidated by the rule in that case, which was merely an assertion of the general rule that in pleadings and

complaints analogous thereto, upon which judicial action is to be grounded, statements of legal conclusions, without the facts upon which they are predicated, are vicious. How does it appear that this affidavit states a mere legal conclusion, and that there are undisclosed facts? If A. says to B., "I will let you have that house by the month, for \$10 a month," and B. acquiesces and goes into possession, I think a statement that A. leased to B. by the month, at \$10 a month, would sufficiently state the facts of the letting. The legal effects of a letting, by these words, is then determinable by the Court. To require more than this would be laying down a rule more stringent than that in the case of *Brahn v. Jersey City Forge Co.*, 9 Vroom, 74. I think the affidavit is, in this respect, sufficient. It is also urged that the statement in the affidavit that "the said term has expired, and the said Steffens holds over," is also a conclusion of law merely, and so insufficient. But it is not the statement of legal conclusions which invalidates the affidavit, but the absence of a statement of the facts upon which such a conclusion can be grounded. The tenancy in this case is alleged to be terminated by notice. The renting and the notice as to terms and time are set out fully. If they support this conclusion, its statement as a conclusion does no harm, and if the facts fail to support it, its statement affords no assistance to the claimant.

What, then, in the first place, is the character of his tenancy, in respect to time?

To support the judgment in this case, it must be a monthly letting. The defendant insists that the words employed by the claimant, in the affidavit, import a tenancy at will, or from year to year, and therefore a three-months' notice was requisite to determine the tenure. The question is important from the fact that, acting upon the supposition that the tenancy was monthly, only a month's notice was attempted by the claimant. Indeed the distinction between tenancies from year to year and tenancies for a less period, in all the cases, seems to be important only in relation to the notice by which the determination of either kind can be effected. Unless it can be

shown that monthly or weekly tenancies are unknown, I do not see how it is possible to hold the tenancy described in the affidavit to be other than a monthly tenancy. That such tenancies have an existence, the cases hereafter cited will establish, and to hold that the contract here shown is a monthly letting is only giving to the words of the affidavit their literal force. Further argument would be wasted upon this point.

If a monthly tenancy, is there a sufficient notice shown?

The rule relative to notices seems to be as follows: Where there is a lease for a certain period the term determines without notice: *Cobb v. Stokes*, 8 East, 358; *Right v. Darby*, 1 Term R. 159; *Decker v. Adams*, 7 Halst. 99. In uncertain tenancies reasonable notice was necessary, which reasonable notice had, from the time of Henry VIII, according to Lord ELLENBOROUGH, been six months: *Doe, d. Strickland, v. Spence*, 6 East, 120.

This rule was applied to all uncertain tenancies in this State, whether rent was or was not reserved: *Den v. Drake*, 2 Green, 523. The time was changed to three months by Act of 1840 (Pamph. L., p. 104), now, with a little change in the text, the twenty-seventh section of the landlord and tenant Act in the revision: Rev., p. 575.

In cases of tenancies for periods running less than a year, the rule enunciated by the text-writers is that the notice must be regulated by the letting, and must be equivalent to a period: *Taylor on Land. and Ten.*, § 478; *Archb. on Land. and Ten.* 87. How the rule arose is uncertain. It certainly did not have its origin in any resolutions of the Courts. Indeed, Baron PARKE, in *Huffell v. Armistead*, 7 C. & P. 56, said that he knew of no decision holding a week's or month's notice was necessary to determine a weekly or monthly tenancy. See, also, the remarks of the Judges, to the same import, in *Towne v. Campbell*, 3 C. B. 921.

It seems, however, to have very early shaped itself into a custom. The habit of giving and requiring reasonable notice, in cases of tenancies, not for a single term, but for recurring periods, which reasonable notice, when the periods were from

year to year, was, according to Lord ELLENBOROUGH, very early held to be six months, was, probably by a custom equally as old, in tenancies for less periods, established as now stated by the books.

By strict relativeness, the rule of a half year's notice in tenancies from year to year, would only require a half month's or a half week's notice in cases of monthly or weekly tenancies. The briefness of the latter, and the length of the former kind of tenancies was the probable reason why the rule was not uniform. Whatever the reason of the rule, it seems to have been well grounded in the general understanding of the English people. The cases cited by the books of authority in support of the rule already stated are merely recognitions of what was obviously a custom, and, as such, the cases would seem to have as much weight as authority as if they had expressly ruled the point.

The first is the case of *Doe, ex dem. Parry, v. Hazell*, 1 Esp. 94. It was a case of ejectment, tried before Chief Justice KENYON in 1794. The full report of the case is as follows: The defendant had taken the house by the month, and a month's notice to quit had been given. It was agreed that the notice had reference, in all cases, to the letting, and that a month's notice was sufficient to entitle the plaintiff to recover.

In *Peacock v. Raffun*, 6 Esp. 4, tried before Lord ELLENBOROUGH in 1808, the Court remarked that a week's notice to quit was certainly sufficient where the holding was weekly.

In *Doe, d. Campbell, v. Scott*, 6 Bing. 362, the same rule was, in 1830, recognized by the Court of Common Pleas. The rule was incorporated in the text of the books of authority upon this subject as the law, and may be considered as settled both in England and in this country, excepting where the matter of notice has been the subject of statutory regulation: *Prindle v. Anderson*, 19 Wend. 391; s. c., 23 Wend. 616; *Seem v. McLees*, 24 Ill. 192; *Walker v. Sharpe*, 14 Allen, 43.

The common-law rule, I take to be undoubted, that notice is necessary to determine a monthly or weekly renting, and that a month's or week's notice, respectively, is sufficient.

2. It is said that the notice in this case is insufficient, because the day for quitting named in the notice was the first of August, and not the last day of July.

The point made is, that according to the statement of the affidavit, the term originally commenced on the 1st day of May, and, by the usual mode of computation, it determined on the last day of the month. So, throughout the tenancy, the recurring periods each terminated on the last day of each month. It is, therefore, urged that the notice was given to quit on a day subsequent to the last day of the term, and that then a new term had commenced to run, and that, therefore, the tenants holding must continue until determined by a new notice: Taylor on Land. and Ten., § 477.

It is true that the notice required to determine these tenancies must be given to quit at the end of a period. When a term has commenced without such notice, the tenant is entitled to remain during and bound to pay for the term.

A notice given to quit in the middle of a term is ineffectual: Archb. on Land. and Ten. 86; Taylor on Land. and Ten., § 476. But no case has been cited which supports the position of the prosecutor, or the statement of Mr. Taylor in § 457 of his work. The cases in the State of Massachusetts are put upon the construction of their statute concerning notices in cases of uncertain tenancy, with rent payable at designated intervals: Walker v. Sharpe, *supra*.

The question whether the day mentioned in the letting is to be computed or not is frequently involved in cases of suits for trespass and in actions in which the length of a notice is in question. In such instances nice distinctions have been taken, relative to the language of the letting, whether the term is to commence "on," or "from," or "from the date," or "from the day of the date:" Wilcox v. Wood, 9 Wend. 345; Sheets v. Sheldon's Lessee, 2 Wall. 177; Pugh v. Duke of Leeds, Cowper, 714.

If the notice was short by one day, in case the month's tenancy expired on the last day of July, or if an action of trespass was pending for the tenant's occupancy on the 1st day



of August, the question of computation of the first day might be material. But no case, I think, can be found which holds that the notice to quit is invalid merely because it names, as the day to quit, a day which corresponds in date with the day named in the original letting, whatever the words of the letting.

In England the letting was usually from and to certain feast-days, and the tenant usually entered and quit on those days, and the notices to quit named that day. In *Doe, ex dem. Eyre, v. Lambly*, 2 Esp. 635, the tenant told the purchaser of the reversion that his tenancy commenced on Lady-day, and notice was given to quit on that day. No objection was raised on the ground that notice should have been given to quit on the preceding day, but it was attempted to show that the term actually commenced at another period, which was not allowed, on the ground that the tenant was estopped.

In *Kemp v. Derrett*, 3 Camp. 510, the defendant became tenant on the 29th of October, 1810. On that agreement, Lord ELLENBOROUGH held it to be a tenancy from three months to three months, and said that, therefore, a notice expiring at the end of any quarter from the time of entry would have been sufficient to determine the tenancy. He said that the notices should have expired on the 29th of January, or on the 29th of April, or on the 29th of July.

The following cases show that it was almost the uniform custom to name the day corresponding with the date of the letting and entry of the tenant as the time for quitting, and in these cases no objection seems to have been raised to the sufficiency of the notices on that ground: *Roe v. Ward*, 1 H. Black, 97; *Doe v. Weller*, 7 Term R. 478; *Mills v. Goff*, 14 M. & W. 72; *Doe, d. Cornwall, v. Matthews*, 11 C. B. 675.

And in *Den, ex dem. Finlayson, v. Bayley*, 5 C. & P. 67, this seems to have been the idea of the Court as to the notice in a weekly tenancy.

By strict computation, the term set out by the present affidavit probably terminated on the last midnight of July. I think it would be carrying the rule that a notice to quit must be made with reference to the end of the term, to an illogical

and unreasonable length to hold that a notice given for the day commencing at that midnight is not a good notice. The law is ignorant of fractions of a day. The notice covers all and any period of the twenty-four hours from midnight to midnight. The very moment the tenancy expires the tenant is confronted with a direction to quit. On what process of reasoning can it be said that a new term has commenced before notice is given.

There is another foundation which I think the landlord might have erected to support the validity of his notice, and that is usage. The bulk of the letting, in cities, is in connection with houses used for that purpose only. The constant interchange of tenants and tenements compels simultaneous moving. A strict construction of leases would often compel general movements at midnight. Of course, nothing so absurd is conceivable in practice. I am quite sure that a usage could be shown for the out-going tenant to remove and the incoming tenant to enter on the same day, and that day corresponding with the first day of the various terms. Unless this usage was controlled by express words in the lease the Courts would enforce it: *Wilcox v. Wood*, *supra*.

Without regard to this, as it was not in evidence, I think the notice was sufficient.

In the third place, it is found by the Court below, as a matter of fact, that the agreement for the monthly letting was made on Sunday. It was also found as a fact that the agreement was subsequently ratified by the parties. No subsequent contract, relative to the terms of the letting, appears in the case.

The doctrine enunciated in the case of *Butcher v. Reeves*, 2 Vroom, 224, was that no vitality could be imparted to a Sunday contract by ratification. Whether the words spoken on Sunday could be resorted to in any event for the purpose of showing the character of the tenancy, is very questionable.

Its determination is not essential because, upon another fact shown in the case, I think, without any reference to the original contract, a tenancy by the month arises; and that fact is,

that the payment of the rent was monthly. Where it appears that there is an annual rental reserved, and the payment is to be made by the quarter or month or week, then the renting is a yearly letting, without regard to the periods of payment. But where there is no such letting, and there is no evidence but the mere fact of payment at intervals of a week or a month, the implication is that the renting is a monthly or weekly one, just as the payment is monthly or weekly: *Peacock v. Raffun, supra*; *Anderson v. Prindle, supra*; 23 Wend. 616; *Witt v. Mayor, etc., of New York*, 6 Rob. N. Y. 441.

Upon reaching this conclusion, it follows that the proceeding below must be affirmed, with costs.

*Baker v. Adams*, 5 Cush. 99; *Eastman v. Vetter*, 58 N. W. R. 989; *Shirk v. Hoffman*, 58 N. W. R. 990; *McFall v. McFall*, 14 S. E. R. 985.

## C

### ESTATES AT WILL.

**An estate at will is the interest one has in lands after entry, where he is to hold during the joint wills of himself and the lessor.**

#### a

BURNS *v.* BRYANT,

Court of Appeals, New York, 1865.

31 N. Y. 453.

One Eaton told defendant that he might use certain premises until they were wanted, but must then surrender possession. Defendant entered, and never paid any compensation for the premises. Afterward, Jan. 24, 1859, Eaton gave Bryant written notice to quit, and on Feb. 21, 1859, Eaton leased the premises to Burns for a year, who took possession and put in the crops, and in May and June, defendant plowed up the crops, for which trespass Burns brings this action.

CAMPBELL, J. The defendant was in possession, holding for no particular time, paying no rent, making no compensa-

tion for the use of the land, but under agreement to surrender the premises whenever the landlord should require the possession. He was clearly a tenant at will: *Post v. Post*, 14 Barb., 253, and cases and authorities cited there. As such tenant at will the defendant was entitled to one month's notice to quit and surrender the premises: 3 R. S., 5th ed., p. 35, §§ 7, 8, 9. The duration of the tenancy is uncertain, and the landlord cannot eject the tenant summarily. He has one calendar month in which to make his arrangements to remove. The form of the notice is not prescribed further than it must require the tenant to remove from the premises, and it must be in writing. The 9th section declares that "at the expiration of one month from the service of such notice the landlord may re-enter, etc." In this case, the premises being unoccupied at the time, the landlord re-entered by the plaintiff before the expiration of the month. But the trespasses were not committed till May and June following, two or three months after the month had expired. The fact that the notice was served on the 24th of January, requiring the tenant to remove on the 20th of February, could make no difference, as there is no claim for trespasses committed prior to the 24th of February. All the defendant was entitled to was one month's notice to quit. It could make no difference that a specific day was fixed in the notice. The statute would still give him the month in which to make his preparations to remove. This month had long expired when the defendant virtually undertook to re-enter himself, as against his landlord, claiming that his tenancy had not terminated.

It seems to me very clear that there was no foundation for such a claim on the part of the defendant.

This judgment should be affirmed.

WILLIAMS, R. P. 388; 2 Bl. Comm. 146. It is at the will of both parties: *Richardson v. Langridge*, 4 Taunt. 129.

## b

## How Created.

An estate at will may be created by express words, or by implication of law, as where one enters land by permission of the vendor under a contract to purchase, and the vendor afterward refuses to convey the premises. In such case the party in possession is a tenant at will, and is entitled to emblements.

HARRIS *v.* FRINK,  
Court of Appeals, New York, 1872.  
49 N. Y. 24.

Where Harris took possession of land by consent of Frink under a parol agreement to purchase. Harris sowed the land to oats, and was prevented from harvesting them by Frink's agents, who entered the land and cut the oats. Harris brings this action to recover possession of the grain.

RAPALLO, J. The crop of oats in controversy was alleged, in the opening of the plaintiff's counsel, to have been sowed by the plaintiff while in possession of the land under a parol contract of purchase. It was also offered to be shown that the crop was raised with the consent of the vendor, it having been a part of the agreement that the plaintiff should go into immediate possession of the farm, and work it until the defendants, who were the agents of the vendor, should be ready to carry out the agreement of sale; that the defendants assisted the plaintiff in putting in the crop, receiving pay from him for their work as hired men by the day; that afterward, in the month of May, the defendants expelled the plaintiff from the farm and repossessed themselves of it, and the vendor refused to convey pursuant to the agreement; that, when the crop was ripe, the plaintiff commenced harvesting it, but was driven off by the defendants, who took possession of the oats and harvested them. The plaintiff also offered to prove that the defendants had admitted that the crop belonged to him. The Judge, at the trial, non-suited the plaintiff on this opening, and exception was duly taken.

No question appears to have been made as to the authority of the defendants to represent and act for the vendor, who was

their brother ; but the non-suit appears to have been granted and sustained at general term on the ground that the crop was part of the realty, and that the plaintiff, having no legal title to the land, could have none to the crop ; that he was not a tenant, for the reason that no action would lie against him for use and occupation ; and further, that having been ejected and kept out of possession of the land, he could not maintain any action for taking the crop when he was out of possession.

The contract of sale, not being in writing, was void by the statute of frauds ; but the plaintiff's possession under it was lawful, so long as he made no default. He was in possession under a parol license from the owner to occupy and work the farm until a conveyance should be executed pursuant to the agreement of sale. The invalidity of that agreement enabled the vendor to revoke the license at any time. It did not vest in the plaintiff the title to the land, but does it necessarily follow that he acquired no title to the crop which he had sown in reliance upon the owner's permission to occupy and work the farm ? Under some circumstances a growing crop is part of the realty and passes with it ; but in many cases it is treated as a chattel. It may be owned by one person, while the title to the land is wholly in another, and this result may be brought about either by operation of law or by express contract. When planted by the owner of the soil it constitutes in general part of the realty and will pass to the vendee by a conveyance of the land ; but the owner of the soil may sell a crop to be cut without conveying any interest in the land, and the purchaser will acquire title to it as a chattel, even though not fit for harvest at the time of the sale : *Evans v. Roberts*, 5 B. & C. 829 ; *Jones v. Flint*, 10 A. & E. 753 ; *Samsbury v. Matthews*, 4 M. & W. 343 ; *Craddock v. Riddlesbarger*, 2 Dana, 206 ; *Newcomb v. Ramer*, 2 J. R. 421, note *a* ; *Austin v. Sawyer*, 9 Cow. 39, 42, 43. So if a lessor covenants with a lessee for years that he shall have the emblements, the property in the corn is well transferred, though it be not severed during the term : *Hobart*, 175.

And it is not necessary to the validity of an agreement by

the owner of the soil, whereby another acquires an interest in the crops, that the relation of landlord and tenant should exist between them. An agreement to allow one to work land on shares for a single crop is no lease of the land ; but the parties to such an agreement become tenants in common of the crop. They acquire a joint property in the growing crop and may unite in an action of trespass *de bonis* for cutting and carrying it away : *Foot v. Litchfield*, 3 Johns. 216, 221 ; *Moulton v. Robinson*, 7 Foster, 550 ; while in such a case the owner of the land alone can bring trespass for breaking the close : *Cro. Eliz.* 143 ; 8 Johns. 151.

So, where the owner of land agreed by parol that one Hatch might use it so long as would be sufficient to compensate him for clearing it, and Hatch planted a crop of wheat, which was levied upon in December as wheat in the ground, upon an execution against Hatch, the occupant, it was held that the wheat was a chattel and the levy good and sufficient to authorize the sheriff to harvest the wheat in the following August : *Whipple v. Foot*, 2 Johns. R. 418.

In *Green v. Armstrong*, 1 Denio, 554, 556, numerous cases are cited showing that growing crops, which are the produce of manual labor and cultivation, may be conveyed by verbal contract as goods and chattels and sold on execution, and that trover may be maintained for them against one in possession of the land : *Dunne v. Ferguson*, 1 Hayes, 542 ; see, also, *Austin v. Sawyer*, 9 Cow. 39, 42. And they may be mortgaged by one out of possession of the premises : *Fry v. Miller*, 45 Pa. St. 441 ; *Stewart v. Doughty*, 9 Johns. 108.

Not crops only, but other things attached to the realty by one not owning the land, but with the consent of such owner, are frequently treated as chattels : *Lancaster v. Eve*, 5 C. B., N. S. 727 ; *Dame v. Dame*, 38 N. H. 429, and authorities cited ; *Smith v. Benson*, 1 Hill, 176 ; *Russell v. Richards*, 10 Maine, 429 ; 35 N. H. 480 ; 27 Pa. St. 291. And buildings erected with the consent of the owner of the land by one in possession under a parol contract of sale, have been held to be the personal property of the party erecting them : *Yates v. Mullin*,

23 Ind. 562. Where a chattel has been annexed to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether it does so or not may be a question on the evidence, and the jury may infer, from circumstances, an agreement that the owner of the chattel should have liberty to take it away: *Wood v. Hewett*, 8 Adol. & Ell., N. S. 913.

From the verbal agreement set forth in the opening, that the plaintiff might work the land, in connection with the fact that the crop was sown with the consent and assistance of the defendants, who were the agents of the owner of the land, and that they were paid for their services by the plaintiff, the jury might infer an agreement that the crop thus sown should belong to the plaintiff. If such was the agreement, it did not become part of the realty, but remained the personal property of the plaintiff. If an owner of land can, by a parol agreement to work on shares, vest in another the title to half or a greater share of a crop raised on his land, or can sell the crop growing, why can he not agree that the party raising the crop shall have the whole of it? If, by making such an agreement, he induces the other to expend his labor and his money, there is no want of consideration for the contract, and I can see no legal objection to giving effect to it.

The invalidity of the parol agreement to sell and convey the land, did not affect the plaintiff's title to the crop. If the agreement had remained executory in all its parts, of course none of its stipulations could have been separately enforced, though if standing alone they might have been valid. But although, by reason of the entirety of the contract, the plaintiff could not have enforced the stipulation allowing him to possess and work the farm, so long as it remained executory, yet, after it had been so far executed that the crop had been sown and was growing, the invalidity of the other provisions of the contract, under the statute of frauds, could not be invoked by the party who refused to complete, as against the party not in default, for the purpose of invalidating that part



of the contract which had been executed, and divesting the plaintiff's title to the crop raised in pursuance of it. The plaintiff was not in default, and was not the party asserting the invalidity of the contract. For aught that appears he was, when ejected, ready and willing to complete the performance of it. He therefore could not be compelled to relinquish any benefit he had acquired from its partial performance: *Dowdle v. Camp*, 12 Johns. 451; *Abbott v. Draper*, 4 Den. 51, 53; *Collier v. Coates*, 17 Barb. 471, and cases cited; *Erben v. Lorillard*, 19 N. Y. 302, 304; 7 Cow. 92; 1 Pick. 328; 20 Ib. 142; *King v. Brown*, 2 Hill, 489; *Lockwood v. Barnes*, 3 Ib. 128; *Bennett v. Scutt*, 18 Barb. 347. In *Ex'rs of Pierrepont v. Barnard*, 2 Seld. 279, the purchaser was allowed to carry off and retain timber actually cut in pursuance of the parol license of the vendor, though as to the timber not cut the agreement was void, under the statute of frauds, and therefore but a revocable license. The crop was the product of the plaintiff's labor and money, expended while he was in possession of the land under the agreement. That possession was originally lawful, and the plaintiff had done no act and committed no default rendering it tortious. The jury could have found that the crop was raised by the plaintiff for his own benefit, with the consent of the vendor of the land. It had not, under those circumstances, become part of the realty as between the plaintiff and the party under whom he held, but was, from the time it was sown, a chattel belonging to the plaintiff, the title to which had never been transferred to the owner of the soil or to the defendants. It could have been lawfully levied upon on execution against the plaintiff: 2 Johns. 418, 421; 9 Ib. 112. And if the facts are as stated in the opening, the plaintiff had the same right to it which he would have to any chattel which he might, during his temporary possession, have placed upon the land by consent of the owner, and which remained there when he was ejected: 1 Hill, 176.

The re-entry by the defendants upon the land did not deprive the plaintiff of his title to the crop as personalty. The

defendants are alleged to have been the agents of the owner and vendor of the land, with whom the plaintiff had contracted. There is nothing to show that their entry was adverse to such owner, or that it was not in his right and behalf. If the entry had been by a stranger, and adverse not only to the plaintiff but to the party through whose contract his right to the crop as personalty was derived, such an entry might have had the effect claimed. A crop may be personalty as to one party and not as to another. As between landlord and tenant, it is personalty during the term, or even after its expiration, if the term is determinable at will, or if the lessor has agreed that the tenant shall have the crop: *Hobart*, 175. But as between the tenant and one claiming under the foreclosure of a mortgage of the landlord made prior to the lease, it goes with the realty: 1 B. Ch. 613; 2 Den. 174. And such is the case wherever the question arises between one who has cultivated the crop and one who enters by title paramount to the party by whose consent the property was cultivated. There is no privity between them: *Lane v. King*, 8 Wend. 584. And the same result follows from the disseisin by a third party of the party by whose consent the land was cultivated. Where land is cultivated on shares, the owner of the land and the party who works it are tenants in common of the crop as a chattel. But if the owner of the land is disseised while the crop is growing, the right to the crop as a chattel ceases. If cut by the disseisor, replevin for it cannot be maintained as against him by either of the owners of the crop: *Demott v. Hagerman*, 8 Cow. 220. But similar consequences would not follow from the mere exclusion of the sower of the crop by the owner of the land with whom he had contracted. Such an exclusion would not destroy the privity between the parties, and the character of the property would not, thereby, be changed. If it could, every owner whose land is worked on shares, could, by his own wrongful act, divest the party, with whom he has contracted, of his title to the products of his labor.

It is urged by the respondent that, by part performance of the contract of sale, the plaintiff had become entitled to spe-

cific performance in equity ; that, therefore, he had an equitable title to the land when he sowed the crop, and it consequently became part of the realty.

We do not think that it lies with the defendants to assert this equity. It is clear that the plaintiff had not the legal title to the land ; and the allegation was that the vendor, in whose behalf the defendants acted, refused to perform the contract to sell. Neither he nor the defendants appear to have recognized any equitable title to the land in the plaintiff and they should not, after having ejected him, be allowed to set it up for the purpose of depriving him of his property which they have appropriated. Furthermore, the equitable seisin of a vendee before conveyance is, in general, recognized where a conveyance is finally decreed or made, and dates by relation from the time he was entitled to a conveyance. Here the contract was never enforced or performed.

I have, thus far, examined the case without reference to the position of the plaintiff's counsel, that the plaintiff, having entered upon the land with the license and permission of the owner to occupy and work it, became a tenant at will ; and, as such, entitled to the emblements : *Co. Litt.* 55 *b*, notwithstanding that he entered under a contract of purchase.

The simplest form of a tenancy at will was where one man let to another to hold at the will of the lessor : *Co. Litt.*, § 68. But the tenancy at will may be created otherwise than by express contract ; it may arise by implication : *Craft on Real Prop.*, § 1544. And an obligation to pay rent is not a necessary incident of such a tenancy. Where one enters by permission of the owner for an indefinite period, and without the reservation of any rent, he is, by implication of law, a tenant at will : *Doe v. Baker*, 4 Dev. N. C. 220. If he be placed upon the land without any terms prescribed or rent reserved, and as a mere occupier, he is strictly a tenant at will : *Jackson v. Bradt*, 2 Caine's R. 174 ; 4 K. C. 114–125, 11th ed. ; *Post v. Post*, 14 Barb. 253 ; *Burns v. Bryant*, 31 N. Y. 453. Where a householder permitted another to occupy, rent free, the occupant was held to be a tenant at will : *Rex v. Collett*, Russ. &

Ry. 498; *Jackson v. Bryan*, 1 Johns. 322, and would be entitled to emblements: *Doe v. Price*, 9 Bing. 357, 358. A parol gift of land creates a tenancy at will: *Jackson v. Rogers*, 1 Johns. Cas. 33; s. c., 2 Caine's Cases, 314. And there is much authority in favor of the position, that one who is let into possession under a contract to purchase is strictly a tenant at will: Washburn on Real Property, 511, 513, 515, 3d ed.; *Howard v. Shaw*, 8 M. & W. 118-122; *Waring v. King*, Ib. 571; *Doe v. Miller*, 5 Car. & P. 595; *Doe v. Chamberlaine*, 5 M. & W. 14; *Right v. Beard*, 13 East, 210; *Gould v. Thompson*, 4 Met. 224; 12 Mass. 325. And he has the right of ingress and egress to remove his effects: *Love v. Edmonston*, 1 Iredell (N. C.) 152; *Jones v. Jones*, 2 Rich. L. R. (S. C.) 542; *Doe v. Baker*, 4 Dev. 220; *Manchester v. Doddridge*, 3 Iredell, 360; *Lowry v. Tew*, 3 Barb. Ch. 414; 5 Wend. 29. He is not liable for rent, because a promise to pay rent cannot be implied in such a case, the tenant having entered under a different contract: *Smith v. Stewart*, 6 Johns. 46; *Bancroft v. Wardwell*, 13 Ib. 489; *Winterbottom v. Ingham*, 7 Q. B. 611. But, nevertheless, he is a tenant at will: *Howard v. Shaw*, 8 M. & W. 122. And he is not entitled to notice to quit if he makes default in his contract: *Jackson v. Miller*, 7 Cow. 747. A tenant strictly at will was not, prior to the Revised Statutes, entitled to notice to quit: *Jackson v. Bradt*, 2 Caine's R. 169; *Doe v. Baker*, 4 Dev. 220; *Jackson v. Bryan*, 1 Johns. 322; 13 Maine, 214; 2 Esp. 717; Crabb on Real Property, § 1559; *Post v. Post*, 14 Barb. 253. From considerations of equity, tenancies at will were, under certain circumstances, treated by the Courts as tenancies from year to year merely for the sake of notice to quit: 4 Cow. 350. This is called by Chancellor KENT a species of judicial legislation: 4 K. C. 127, 11th ed.; *Jackson v. Bryan*, 1 Johns. 322. But this indulgence was not extended to a tenancy at will created by entry under a parol contract of purchase: 7 Cowen, 751, 752; *Suffern v. Townsend*, 9 Johns. 35; 9 Ib. 331. In England, a tenant at will by entry under a contract of purchase is not entitled to notice to quit at a future time; but, unless he does some wrongful act

to terminate the tenancy, he cannot be treated as a trespasser or sued in ejectment without a demand of possession: 5 Carr. & P. 595; 13 East, 210; 5 M. & W. 14. If he makes default in his contract of purchase or commits waste, or in any other manner terminates the tenancy by his own wrongful act, he becomes a trespasser, and may be sued as such or in ejectment, and he cannot dispute the title of the party under whom he entered: *Cooper v. Stower*, 9 Johns. 331; *Doolittle v. Eddy*, 7 Barb. 74; 1 Wend. 418; 5 Ib. 30; 6 Johns. 34, 49; and he would, no doubt, forfeit his right to emblements under those circumstances: Co. Litt. 55 *b*.

Expressions are to be found in some of the authorities cited, to the effect that one entering under a contract of purchase does not stand in the relation of tenant to the vendor: 6 Johns. 46; 13 Ib. 489. These expressions are used, however, in reference to the question whether an undertaking to pay rent can be implied. But where a purchaser of a farm enters upon it under an express agreement of the vendor that he may occupy and work it until the vendor is prepared to convey, and the agreement to sell is merely by parol, and the question arises with reference to the rights of such an occupant, in case of a refusal of the vendor to perform, and a termination by him of the occupancy, without any default on the part of the occupant, there is strong reason for according to such occupant the rights of a tenant at will. The permission to occupy, unaccompanied by any contract of sale, would clearly create a tenancy at will: 31 N. Y. 453; 2 Caine's R. 174, and cases *supra*. The effect of the invalidity of the contract of sale is to reduce the right of the vendee to that of a mere licensee, and to enable the vendor to revoke the license at his pleasure. When he exercises that right there is no injustice in placing him in the same position as if the contract of sale which he repudiates had not been made. The holding, from the beginning, was, in fact, at his will; and the principles upon which emblements are allowed to a tenant at will would seem applicable to such a case: Comyns' Dig., Title Biens. G. 2; Co. Litt. 55 *a*, 55 *b*.

The plaintiff further offered to prove an admission by the defendants that the crop belonged to him. In *Austin v. Sawyer*, 9 Cow. 39, 43, a similar admission was held sufficient to authorize the jury to presume a formal and valid sale of the crop to the plaintiff without any other evidence. The admission in that case was made by the defendant's grantor at the time of conveying the land to the defendant. Here it was alleged to have been made by the defendants personally.

We think the non-suit was erroneous, and that the judgment should be reversed and a new trial granted, with costs to abide the event.

CHURCH, C. J., and PECKHAM, J., concur.

ALLEN, J., concurs in result on first ground discussed; dissenting from proposition that plaintiff was tenant at will.

GROVER, J., dissents. FOLGER, J., absent.

Judgment reversed.

Where no term is fixed in a lease the lessee is a tenant at will, and he may terminate his tenancy by proceeding as directed by statute: Minn. Gen. Stat. 1878, ch. 75, § 40; *Sanford v. Johnson*, 24 Minn. 172. Estates at will exist at the will of both parties, but they may be determined by the will of either party: *Knight v. Indiana Coal Co.*, 47 Ind. 105, 111. If the owner of land permits another to occupy it without any lease or agreement to pay rent, and such person merely takes care of it for the owner, an estate at will is thereby created: *Jones v. Shay*, 50 Cal. 508.

## C

### Termination.

**An estate at will may be terminated by either party, or by implication of law, as upon the death of one of the parties.**

SAY *v.* STODDARD,  
Supreme Court of Ohio, 1875.  
27 Ohio St. 478.

SCOTT, C. J. The contract of lease between Stoddard, Sr., and Celey, set out in the petition in the Court below, created, by its express terms, a tenancy at will.

True, the rent was to be \$13.00 a month, and was to be

paid by Stoddard & Co, out of Celey's wages, monthly or half monthly, as might be most convenient. But the renting was to continue for "so long as the parties shall mutually agree to continue the renting under this agreement." And, again: "Either party may put an end to said renting by giving the other party four days' notice, in writing, that this renting is to cease at the expiration of four days from the service of such notice on the other party." It is clear, from this language, that the tenant was to hold at the will of the lessor, though while the tenancy continued the rent was to be paid monthly or half-monthly. The character of the tenancy is not affected by the fact that four days' notice of its determination, is provided for in the contract; for in a general tenancy at will, reasonable notice must be given by the party whose will determines it, to the other party; and the contract here fixes the length of that notice. It is said by Blackstone: "An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession:" 2 Bl. Com. 145; Litt., § 68. Such tenant has no certain indefeasible estate, nothing that can be assigned by him to any other, because the lessor may determine his will, and put him out whenever he pleases: 2 Bl. Com. 145; Taylor's Landl. and Ten. 48.

Tenancy at will may be determined by implication of law. Such implication will arise on the death of either of the parties. So, if a tenant at will assigns over his estate to another who enters on the land he is a disseisor, and the landlord may have an action of trespass against him: Greenl. Cruise on R. Pr. 244; Taylor's Landl. and Ten. 48.

So, also, a desertion of the premises by the lessee, puts an end to the tenancy at will. For he thereby discontinues his lawful possession and terminates his relation to his lessor, which is only of a personal character, and he ceases to have any interest in the premises which he can transfer or control.

The plaintiff shows, by his petition, that Stoddard, the lessor, died November 1, 1869, leaving the defendant his devisee of the premises. Celey, the lessee, continued in possession till

December 1, when he undertook to sublet a part of the premises to the plaintiff. It is not alleged that the defendant assented to this continuance of possession, or subletting. On the 7th of December, the lessee, Celey, removed wholly from the premises; and, eight days afterward, the grievances occurred of which the plaintiff complains. As against the defendant, the plaintiff acquired no rights by his contract with Celey, for the latter had none which he could transfer. The facts stated do not show that the relation of landlord and tenant was ever created between the parties to this suit. There was neither privity of estate, nor of contract between them. And the acts complained of were but the lawful exercise of the rights incident to the defendant's ownership of the premises, and are not charged to have been attended with any unnecessary interference either with the plaintiff's person or property.

We think the Court below properly sustained the demurrer to the plaintiff's petition, and its judgment is affirmed.

By notice: *Doe v. Richards*, 4 Ind. 374; *Price v. Price*, 9 Bing. 356 (23 Eng. Com. Law, 614). Waste by the lessee: *Daniels v. Pond*, 21 Pick. 367. Desertion of premises: *Chandler v. Thurston*, 10 Pick. 205. Lessee claiming title: *Walden v. Bodley*, 14 Pet. 156. Not assignable: *Cunningham v. Holton*, 55 Maine, 33. As to notice to quit, see: *Minn. Gen. Stats.* 1878, ch. 75, § 40.

## D

### ESTATES AT SUFFERANCE.

**An estate at sufferance is created when a person comes into possession of land lawfully, but holds over wrongfully after his estate therein has terminated.**

RUSSELL *v.* FABYAN,

Supreme Judicial Court of New Hampshire, 1856.

34 N. H. 218.

BELL, J. Fabyan entered into possession of the premises in question under a written lease, to continue for five years



from March 20, 1847. He remained in possession until April 29, 1853, when the buildings were burned down, more than a year after the lease expired. During the interval between the 20th of March, 1852, and April 29, 1853, he was either a tenant at sufferance, a tenant at will, or a disseisor. The general principle is that a tenant who, without any agreement, holds over after his term has expired, is a tenant at sufferance: 2 Bla. Com. 150; 4 Kent Com. 116; *Livingston v. Tanner*, 12 Barb. 483. No act of the tenant alone can change this relation; but if the lessor, or owner of the estate, by the acceptance of rent, or by any other act indicates his assent to the continuance of the tenancy, the tenant becomes a tenant at will, upon the same terms, so far as they are applicable, of his previous lease: *Conway v. Starkweather*, 1 Denio, 113.

In this case there is no evidence to justify an inference of assent by the lessor to any continuance of the tenancy, but, on the contrary, very direct and conclusive evidence, in the demand of possession, to the contrary; while the reply made to that demand by Fabyan negatives any consent on his part to remain tenant of the plaintiff. There was, then, no tenancy in fact between these parties at the time of the fire, and the defendant was consequently either a disseisor or a tenant at sufferance.

When the demand of possession was made upon Fabyan, upon the 22d of March, 1852, the demand was refused, Fabyan saying he had taken a lease of the property from Dyer. The previous demands seem to have been premature, and before the expiration of the lease, but they were refused upon the same ground as the last, and that refusal might constitute a waiver of any objection to the time of their being made.

Such a denial of the right of the lessor, though not a forfeiture of a lease for years, is sufficient to put an end to a tenancy at will, or at sufferance, if the lessor elects so to regard it; and he may, if he so choose, bring his action against the tenant as a disseisor, without entry or notice, and may maintain against him any action of tort, as if he had originally entered by wrong: *Delaney v. Ga Nun*, 12 Barb. 120.

But as this result depends on the lessor's election, and nothing appears in the present case to indicate such election, the tenant must be regarded as a tenant at sufferance.

To ascertain the liability of a tenant at sufferance for the loss of buildings by fire it becomes material to inquire what is the nature of this kind of tenancy; and we have examined the books accessible to us, to trace the particulars in which it differs from the case of a party who originally enters by wrong.

All the books agree that he *retains* the possession as a wrong-doer, just as a disseisor *acquires and retains* his possession by wrong: *Den v. Adams*, 7 Hals. 99; 2 Bla. Com. 150; 4 Kent Com. 116. By the assent of the parties to the continuance of the possession thus wrongfully obtained or retained, the wrong is purged, and the occupant becomes a tenant at will or otherwise to the owner: 10 Vin. Ab. 416, Estate, D, C, 2.

If no such assent appears, the tenant is entitled to no notice to quit: *Jackson v. McLeod*, 12 Barb. 483; 12 Johns. 182; 1 Cru. Dig., tit. 9, § 10.

The owner may make his entry at once upon the premises, or he may commence an action of ejectment or real action: *Livingston v. Tanner*, 12 Barb. 483; *Den v. Adams*, 7 Hals. 99. And it makes no difference that the lessee, after his term has expired, has taken a new lease for years of a stranger rendering rent, which has been paid; for he still remains tenant at sufferance as to the first lessor, as we held in *Preston v. Love*, Noy, 120; 10 Vin. Ab. 416.

We have been able to discover but one point of difference between the case of the disseisor and the tenant at sufferance, which is that the owner cannot maintain an action of trespass against his tenant by sufferance until he has entered upon the premises: 4 Kent Com. 116; a point to which we shall have occasion further to advert.

Upon this view the liability of the defendant Fabyan, to answer for the loss by fire, which is the subject of this suit, is regulated, not by the rule applicable to tenants under contract, or holding by right, but by that which governs the case of the disseisor and unqualified wrong-doer.

By Stat. 6 Anne, chap. 31, made perpetual 10 Anne, chap. 14 (1708, 1712), no action or process whatever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin: Co. Litt. 67, n. 377; 3 Bla. Com. 228, n.; 1 Com. Dig. 209, Action for Negligence, A, 6. It is not necessary to consider whether this statute has been adopted here, though it is strongly recommended by its intrinsic equity, because at all events a different rule applies in this case.

The mere disseisor or trespasser, who enters without right upon the land of another, is responsible for any damage which results from any of his wrongful acts. Such a disseisor is liable for any damage occasioned by him, whether willful or negligent. He had no right to build any fire upon the premises, and if misfortune resulted from it he must bear the loss.

For this purpose the defendant Fabyan stands in the position of a disseisor.

II. Assuming that Fabyan is liable for the loss of these buildings, the question arises, whether he is liable in this form of action; and, as we have remarked, he is not liable in trespass. Chancellor KENT (4 Com. 116), says: "A tenant at sufferance is one that comes into possession of land by lawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer, or transmit, or which is capable of enlargement by release, for he stands in no privity to his landlôrd, nor is he entitled to notice to quit; and, independent of the statute, he is not liable to pay any rent. He holds by the laches of the landlord, who may enter and put an end to the tenancy when he pleases. *But before entry he cannot maintain an action of trespass against the tenant by sufferance.*" 1 Cru. Dig., tit. 9, chap. 2; *Rising v. Stanard*, 17 Mass. 282; *Keay v. Goodwin*, 16 Mass. 1, 4; 2 Bla. Com. 150; Co. Litt. 57, *b*; *Livingston v. Tanner*, 12 Barb. 483; *Trevillian v. Andrew*, 5 Mod. 384.

If, then, Fabyan is answerable at all, he must be liable to the action of *trespass on the case*. There is no evidence of any

entry, and the demand of possession, whatever its other effects may be, is not an entry, nor do we find it made equivalent to an entry.

The case of *West v. Trende*, Cro. Car. 187; s. c., Jones, 124, 224, is a decision that case lies in such a case.

“Action upon the case. Whereas he was and yet is possessed of a lease for divers years *adtunc et adhuc ventur*, of a house, and being so possessed demised it to the defendant for six months, and after the six months expired, the defendant being permitted by the plaintiff to occupy the said house for two months longer, he, the defendant, during the time pulled down the windows, etc. Stone moved in arrest of judgment that this action lies not, for it was the plaintiff’s folly to permit the defendant to continue in possession, and to be a tenant at sufferance, and not to take course for his security; and if he should have an action, it should be an action of trespass, as Littleton, § 71. If tenant at will hath destroyed the house demised, or shop demised, an action of trespass lies, and not an action upon the case. But all the Court conceived that an action of trespass or an action upon the case may well be brought, at the plaintiff’s election, and properly in this case it ought to be an action upon the case, to recover as much as he may be damnified, because he is subject to an action of waste; and therefore it is reason that he should have his remedy by action upon the case. Whereupon rule was given that judgment should be entered for the plaintiff.”

III. It seems clear that if Fabyan is to be regarded as a wrong-doer in retaining the possession of the plaintiff’s property after his lease had expired, all who aided, assisted, encouraged, or employed him to retain this possession, must be regarded as equally tort-feasors, and equally responsible for any damage resulting from his wrongful acts. No more direct act could be done to encourage a tenant in keeping possession, than that of leasing to him the property, unless it was that of giving him a bond of indemnity, such as is stated in this case. In wrongs of this class all are principals, and the defendant, Dyer, must be held equally responsible with Fabyan; and it

seems clear that as Dyer could justify in an action of trespass under the authority of Fabyan, so as, like him, not to be liable in that action, he must be liable with him in an action upon the case.

Whether the allegations of the declarations are suitable to charge either of the defendants, we have not considered, as the Court have not been furnished with a copy.

IV. The case of *Russell v. Fabyan*, 7 Foster, 529, is not to be regarded as a decision of the question raised in this case, in relation to a sale of a supposed right of redemption as belonging to Burnham, after the first levy made upon the property. It was there held, upon the facts appearing in that case, that independent of the question of fraud in Burnham's deed to Russell, all Burnham's right of redeeming the levy, which might be made upon the attachment subsisting at the time of the deed, and of course good against it, passed to Russell. Upon this point there can be no question, and none is suggested. The question then arose whether, if Russell's deed proved to be fraudulent as to the creditors of Burnham, the right of redemption did not pass to Dyer, by the sale on his second execution, so as to invalidate the tender made by Russell. This question might have been met and decided, but the case did not require it. It was held that whether Russell's title was good or bad, Fabyan, as his tenant, could not dispute it. He could be discharged from his liability to pay his rent, which was the subject of that action, only by an eviction by the lessor, or by some one who had a paramount title to his; a mere outstanding title not put in exercise is not a defense. The defendant relied on an eviction on the 14th of June, 1848, as his defense. The sale of the right of redemption was made on the 31st of July following, and after that date there was no eviction, so that the attempt there was merely to show an outstanding but dormant title, which it proved would be no defense. And the Court took the ground that Fabyan stood in no position to raise a question as to the validity of Russell's title, except so far as the opposing title was the occasion of some disturbance of his estate. So far as the principles stated

in that case are concerned, they appear to us sound and unanswerable. Whether, if the case had taken a different form, the result would have been in any degree different, it is not necessary to inquire.

By our statute, every debtor whose land or any interest in land is sold or set off on execution, has a right to redeem by paying the appraised value, or sale price, with interest, within one year. Rev. Stat., chap. 195, § 13; chap. 196, § 5 (Comp. Stat. 501, 502). This right to redeem is also subject to be levied upon and sold, as often as a creditor supposes he can realize any part of his debt by a sale, until some one of the levies or sales becomes absolute. But these sales have each inseparably connected with them the right of redemption. If the debtor has parted with his title before the levies are made while the property is under an attachment, that right of redemption is vested in his grantee, who, being the party interested (Rev. Stat., chap. 196, § 14), may redeem any sale or levy, if he pleases; the effect of his payment or tender for this purpose being of course dependent upon the state of facts existing at the time.

So, if there is no attachment upon the property at the time of the debtor's conveyance, but his creditors levy upon the property, upon the ground that his conveyance was not made in good faith, and upon an adequate consideration, and so is fraudulent and void as to them, the effect is the same. Any creditor may levy his execution upon the right of redemption of any prior levy or sale, the deed of the debtor being without legal operation to place either the property itself or any interest in it out of the reach of his process. And the right of redemption, so long as it retains any value in the judgment of any creditor, remains liable to his levy; but when the creditors have exhausted their legal remedies, the right of redemption, necessarily incident to every levy on real estate, still remains, and it is the right not of the debtor, but of his grantee, who may exercise it at his pleasure.

This we conceive was the position of the present case. The first levy by Dyer being founded on his attachment, took pre-

cedence of Russell's deed ; but Russell had still the right to redeem as grantee of Burnham, whether his deed was valid as to creditors or not. When the right of redeeming the first levy was sold, on the ground that the deed to Russell was fraudulent and invalid, a right of redemption still remained to Russell, and he had a right, as a party interested in the land, to pay or tender the amount of the first levy to Dyer, and so to discharge it. By that payment or tender it was effectually discharged, whatever might be the rights or duties of Dyer, or Russell, or any one else, growing out of the sale of the right of redemption upon Dyer's second execution, which, being founded upon no attachment, was *prima facie* a nullity as to Russell, and was dependent for its effect upon the evidence that might be offered, showing Russell's deed void as to creditors.

The present case stands free from any question growing out of the relation of landlord and tenant, as that relation is not alleged, and the lease of Russell had expired, and Dyer had never stood in that relation. The evidence offered that Burnham's deed to Russell was fraudulent as to his creditors, is not open to any objection of that kind, which was held decisive in 7 Foster. If the facts warrant that defense, the evidence is competent ; and if it should be shown that the deed to Russell was void as to creditors, and Dyer was one of that class, his second levy was good, if properly made, and the title to these premises passed to him, subject to his prior and any subsequent levy, and to Russell's right of redemption.

As the offer of the defendant to prove Burnham's deed to Russell to be fraudulent and void as to creditors, and as to the defendant, Dyer, as one of them, was refused, there must be

A new trial.

WILLIAMS, R. P. 389 ; Smith v. Littlefield, 51 N. Y. 539. No notice to quit is necessary to terminate the estate, independent of statute : Jackson v. Parkhurst, 5 Johns. 128. The occupant is not liable for rent : Flood v. Flood, 1 Allen, 217. The occupant is not entitled to emblements : Doe v. Turner, 7 M. & W. 227.

## III

ESTATES AS TO THE TIME OF THEIR  
ENJOYMENT.

## A

## IN POSSESSION.

An estate in possession is one where the owner has an immediate right to the possession of the land.

## B

## IN EXPECTANCY.

Estates in expectancy are those where the right to the possession of the land is postponed to a future period, and are known as (1) Future Estates, and (2) Reversions.

## 1

## FUTURE ESTATES.

By virtue of statute, an estate in fee, as well as a lesser interest, may be limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

## a

## Without a Precedent Estate.

SABLEDOWSKY *v.* ARBUCKLE.

Supreme Court of Minnesota, 1892.

50 Minn. 475.

MITCHELL, J. The trial Court found that the defendant, Alford J. Arbuckle, was the owner in fee of an undivided two twenty-firsts of the property in controversy and of a life estate in the other nineteen twenty-firsts, to commence at the death



of his father, Samuel C. Arbuckle, Sr.—the two twenty-firsts in fee by inheritance from his mother and the life estate in the remainder under the deed from his father (Exhibit A of answer), dated March 5, 1886. The correctness of these conclusions depends mainly upon two questions, one of law and one of fact, viz.: *First*, the construction and validity of the deed of March 5, 1886, from Samuel C. Arbuckle, Sr., to the defendant, Alford; and, *second*, whether said Alford was incompetent, by reason of mental incapacity, to execute the deeds (plaintiff's Exhibits A, C, and D) under which plaintiff claims.

1. By the deed of March 5, 1886, Samuel C. Arbuckle, Sr., reserving a life estate to himself, assumed to convey a life estate to his son Alford, to commence at his own death, with remainder to Marion Arbuckle, in trust for such persons as should take good, kind, and considerate care of said Alford until his (Alford's) death.

The trial Judge sustained the validity of this deed as a conveyance of a life estate to Alford, but held that its provisions as to the remainder were void. Plaintiff insists that the entire deed is void, because—*First*, a freehold estate to commence in the future cannot be created without a precedent particular estate to support it; and, *second*, the provisions of this deed are so dependent on each other that if part are void the whole are void.

At common law, the intervention of a particular precedent estate, created at the same time, was essential to the validity of a conveyance of an estate of freehold to commence at a future time. The reason was that, without the precedent estate, there could be no livery of seisin to support the remainder; and without livery of seisin no estate of freehold could be created: 2 Bl. Comm. 165; 4 Kent. Comm. 234.

Hence a conveyance of an estate in fee or for life, to commence at the death of the grantor (who reserved or retained a life estate to himself), would have been void if regarded as a feoffment or bargain and sale.

The Courts, however, succeeded in inventing a contrivance by which to uphold such conveyance by implying a covenant

on part of the grantor to stand seized of the lands to his own use during his life, and, after his decease, to the use of the grantee. Of course, they could not be upheld in this State on any such ground, for, under our statutes, there are no implied covenants, and such uses are abolished.

The reason why, at common law, a precedent estate was necessary to support a freehold estate to commence *in futuro* rested entirely upon the subtleties and technicalities of the feudal tenures of real property, which have no application in this State, where all lands are allodial, and not held of any superior. Consequently we are strongly inclined to the opinion that, even in the absence of any statute on the subject, it ought to be held that the common-law rule is not applicable, but that a conveyance of a freehold estate in land to commence at a future time is valid, although no precedent particular estate is created by the conveyance. There is no good reason in the nature of things why this ought not to be so, but our statutes recognize and impliedly authorize such conveyances. 1878 G. S., ch. 45, § 10, defines a future estate as one "limited to commence in possession at a future day, either *without the intervention of a precedent estate* or on the determination by lapse of time or otherwise of a precedent estate created at the same time." Sections 11 and 24 of the same chapter also clearly imply that a future estate may or may not be dependent upon a precedent estate.

The second ground upon which it is claimed that the entire deed is void is equally untenable. It is perfectly manifest that the single purpose of the grantor was to make provision for the care and support of his unfortunate son, who, because of physical and mental infirmities, had been incurably helpless, and wholly dependent on others from his birth.

This was the sole purpose of conveying him a life estate; and then, in order to hold out an inducement to others to be good and kind to the boy, he attempted to provide that upon his son's death the property should go to those who had taken good, kind, and considerate care of him during his life. It could hardly be claimed that if the father had known that

this last provision, intended to insure kindness to his son, would be held invalid, he would not have made the other provision which he did for his benefit.

Plaintiff invokes the application of the rule as to wills laid down in *Darling v. Rogers*, 22 Wend. 483-495, to wit: "that, when a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as from the whole testament taken together was evidently never the design of the testator; otherwise when the good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest." Tested by this rule, there is no room for doubt as to the effect to be given to this deed. The conveyance of the life estate to Alford, and the provision as to the remainder over, are in no way dependent upon each other. Had the grantor known that the provision as to the remainder was void he might have made other provision as to it, but, in view of the single purpose of the conveyance, it is to be presumed that in any event he would still have conveyed the life estate to his son.

2. Upon the issue of fact as to the competency of Alford to execute the deed conveying his interest in the property, all we deem necessary to say is that, after reading the evidence, we are clearly of opinion that it abundantly sustains the finding of the Court that he "was never at any time competent or had the mental or physical capacity requisite or necessary to execute or sign, or to authorize the execution or signing of said deeds, but that he is, and always has been, of imperfect and unsound mind, and wholly incapable of comprehending the force or effect of said deeds." Medical experts and others may testify as much as they please that his ailment is wholly physical and that his mind is sound; that it is "good soil," and only needs cultivation; but the stubborn facts remain apparent from the evidence that, because of this physical ailment, he has been almost entirely helpless from birth, and hence prevented from coming in contact with people and things; that he has not received a particle of education, and is, consequently, although of mature years, in a state of dense

ignorance, with as little idea of the nature of any business transaction and with his intellect (such as he has) as undeveloped as if he was a mere child. It is idle to claim that such a person had any adequate comprehension of the nature and effect of a conveyance of his real estate. This disposes of the two main questions in the case; but there are several minor matters that require to be noticed.

The prior deed from Samuel C. Arbuckle, Sr., to William H. Arbuckle (through whom plaintiff also claims) cuts no figure in the case, for the reason that the Court finds that the deed to Alford was executed for a good and valuable consideration paid to the grantor, and that the grantee had no notice or knowledge of the prior deed to William H. Arbuckle. The correctness of these findings is not questioned by any of the assignments of error, and, as the deed to Alford was first recorded, it is protected by the provisions of the recording Act.

There is nothing in the point that the deeds from Alford should have been set aside or adjudged void only upon restitution of the consideration paid by the grantees. The decisions of the Courts, and sometimes even of the same Court, do not seem to be always entirely agreed as to whether in any case putting the grantee *in statu quo* can be made a condition precedent to setting aside the deed of a lunatic. Compare *Arnold v. Richmond Iron Works*, 1 Gray, 434, with *Gibson v. Soper*, 6 Gray, 279. But the doctrine of the cases most favorable to the plaintiff goes no further than to hold that the grantee must be put *in statu quo*, where the grantor was apparently of sound mind, and not known to be otherwise, and the transaction was in all respects fair and *bona fide*, and the grantor has received, and still has, the consideration of the deed.

In the present case plaintiff has not made one of these facts to appear. It does not appear that she or her grantors ever paid anything to the defendant Alford, or that he ever received a dollar for these conveyances. In fact, it appears affirmatively that he never did. Moreover, it is quite apparent, in view of the intimate relationship of the parties, that plaintiff and those under whom she claims must have been

perfectly cognizant of Alford's mental incapacity when they obtained the conveyances.

It would seem from the evidence that two twenty-firsts of this property still belong to Samuel C. Arbuckle, Jr., and hence that the Court was incorrect in holding that Alford has a life estate in nineteen twenty-firsts. But this is an error, if error it is, that does not affect the plaintiff, and as Samuel C. Arbuckle, Jr., is not a party to the action it cannot affect or bind him.

After the commencement of this action, upon the alleged mental condition of Alford being brought to its attention, the Court continued the case until his mental condition could be tested in the Probate Court upon an application for the appointment of a guardian for him. Thereupon proceedings were had in that Court by which a guardian of his person and estate was appointed, who subsequently answered for him in this suit. Upon the trial of this cause counsel for the defendant introduced in evidence the proceedings in Probate Court (and in the District Court on appeal), including the order or decree adjudging Alford's mental faculties to be imperfect, and that by reason thereof he was incompetent to have charge or management of his person or property, and ought to be placed under guardianship. The admission of this evidence is assigned as error. After reading the somewhat extended discussion between counsel and the trial Court when this evidence was offered, and examining the briefs of counsel in this Court, we are still left somewhat in the dark as to the purpose for which this evidence was offered, and as to the precise nature of the objection interposed to its admission. Defendant's idea seems to have been that, when taken in connection with other evidence showing that this same mental infirmity had existed without change from birth, this adjudication was competent to prove Alford's mental incapacity at the time of the execution of the deeds. And, as near as we can understand it, plaintiff's objection to the evidence was placed, not upon the ground that the adjudication was subsequent to and did not overreach the date of the execution of the deeds, but that it furnished no sufficient ground for avoid-

ing the conveyances, because a person's mental faculties might be so imperfect as to render him a fit subject for guardianship, and yet he not be mentally incapacitated to execute a deed. This is undoubtedly a correct proposition of law, but this would go to the weight, and not to the competency, of the adjudication as evidence of mental incapacity. The objection interposed was therefore not a good one. The adjudication was evidently not considered as conclusive, for the whole question of the defendant's actual mental condition at the time of the execution of the deeds was fully inquired into by parol evidence.

Judgment affirmed.

*Ferguson v. Mason*, 60 Wis. 377.

## b

### With Precedent Estate.

#### *Remainders.*

**A remainder is created by act of parties and is "the remnant of an estate in lands or tenements, expectant on a particular estate created together with the same at one time." Remainders are either vested or contingent.**

#### *Vested Remainders.*

**A remainder is vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate.**

### GREEN v. HEWITT.

Supreme Court of Illinois, 1880.

97 Ill. 113.

The plaintiffs file a bill in equity for a partition of the lands mentioned in the opinion.

MULKEY, J. The whole controversy in this case turns upon the construction to be given to the second clause of the will of William C. Thompson, through which all the parties claim. It is as follows:

"Second. After the payment of such debts and funeral

expenses, I give and bequeath to my beloved wife, Elizabeth Thompson, the farm on which we now reside, situate in said county, and known and described as the north-east quarter of the south-west quarter of section seven, township fifteen, range thirteen, also all my personal property of every description, so long as she remains my widow; at the expiration of that time the whole, or whatever remains, to descend to my daughter, Mary Thompson."

Plaintiffs in error insist that under this provision of the will Elizabeth Thompson took an absolute fee-simple estate in the premises therein mentioned, which are the same lands now in controversy, and of which partition is sought by complainants' bill. If she did not take an inheritance, as contended, but a mere life estate, as is claimed by defendants in error, then it is clear complainants showed no title to the premises in themselves, and the demurrer to the bill was therefore properly sustained by the Court.

To us there seems no room for doubt as to the proper construction of the clause in question. The devise of the farm and personal estate is expressed in a single sentence, one clause of which relating to the land, and another to the personalty. By their punctuation these clauses of the sentence are merely divided by a comma and are connected by the conjunctive adverb "also," which, in that connection signifies in *like manner*, or in addition to; that is, the testator gives and bequeaths the farm, and in like manner gives and bequeaths the personalty. Then follows the qualifying or adverbial clause, "so long as as she remains my widow," which is introduced for the purpose of limiting the entire gift, both of personalty and realty, to the widowhood of the taker. He gives and bequeaths both only so long as she remains his widow. This is both the grammatical and legal construction of the sentence. The meaning is precisely the same as if the testator had said: "I give and bequeath to my beloved wife, so long as she remains my widow, the farm, etc., on which we now reside, and in like manner I give and bequeath to her all my personal estate." She took a mere life estate in the entire gift.

The misapprehension as to the legal effect of the devise doubtless grows out of the use of the expression "whatever remains" by the testator, in limiting the remainder to his daughter. The use of that expression is of no vital significance, and cannot be permitted to override the clearly-expressed intention that the widow should take a life estate only.

As part of the estate devised was personalty, it is but reasonable to suppose that some of it would be of that species of property whose value and use consist solely in its consumption, such as provisions, etc., and it was doubtless the intention and expectation of the testator that property of this character should and would be consumed by his widow, and of course not in existence when her estate terminated. It was also reasonable to suppose that if she lived long as his widow, some of the articles of personalty would be worn out, lost or destroyed; hence, in making the limitation over, it was but natural and proper to use the expression "whatever remains." It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has.

It is further claimed by plaintiffs in error that the estate of the daughter was a contingent remainder, and that inasmuch as she died before the termination of the particular estate which supported it, it never vested at all. Counsel are entirely mistaken in this view. The estate of the daughter had not a single element in it that distinguishes a contingent from a vested remainder. There was certainly no uncertainty as to the person who was to take. It was Mary Thompson, the daughter, clearly. And the time of her taking in possession was equally certain, namely: when Elizabeth Thompson ceased to be the widow of the testator, whether it was effected by death or a second marriage.

A clearer example of a vested remainder could scarcely be conceived. But admitting, for argument's sake, plaintiffs in error are right upon this question, the admission is certainly



fatal to their right of recovery; for, if the daughter took a contingent remainder, of necessity the widow could not have taken a fee, and their right of recovery rests entirely upon the hypothesis that she took a fee-simple title under the will.

We are, in any view, clearly of opinion that the decree of the Circuit Court was right, and it is therefore affirmed.

Decree affirmed.

"If there is a *present right to a future possession*, though that right may be defeated by some future event contingent or certain, there is nevertheless a vested estate:" *Manderson v. Lukens*, 23 Pa. St. 31. *See, also, Olney v. Hull*, 21 Pick. 311; *Thompson v. Ludington*, 104 Mass. 193; *Moore v. Littel*, 41 N. Y. 66.

**To the same point.**

*In re OERTLE.*

Supreme Court of Minnesota, 1885.

34 Minn. 173.

An appeal from an order allowing the widow certain interests in the lands of her husband.

VANDERBURGH, J. The legal questions involved in this case arise upon the construction of the terms of the will of Charles Oertle, deceased, which, after provisions for the payment of debts, disposes of all the residue of his real and personal estate as follows: "I give, bequeath, and devise to my beloved wife, Josephine, all my real estate and personal property, without exception, of which I may be possessed at the time of my death, . . . to hold and possess during the term of her natural life for her own exclusive use and benefit. After the death of my said wife, any and all of the property and estate mentioned above, and which, or any part of the same then left by her, shall be divided among my children equally, share and share alike. As a special provision of this my last will and testament, I make this a condition that my said wife shall, out and from said property left her, provide for the maintenance and a good education of my children. And I hereby make,

constitute, and appoint Otto Winterer and Louis Horst executors of this my last will and testament, with power to sell and dispose of all the property, both real and personal, at public or private sale, at such time or times, and upon such terms, and in such manner, as to them shall seem meet."

The Probate Court adjudged and determined that the surviving wife was entitled to a life estate only in the property, real and personal, and further ordered that, before taking possession thereof, she execute a bond, to be approved by the Court, for the safe keeping and faithful accounting by her of the property or capital fund received by her, to the end that the same might be turned over unimpaired to the children of the testator. Upon appeal, the judgment of the Probate Court was so far modified that it was ordered that the widow should "have power and authority to use, consume, and expend such part and portion of said property as may be necessary for her exclusive use and benefit during the term of her natural life, and to provide for the maintenance and good education of said children; but that said executors have the sole and exclusive power to sell any of said property at any time during her life; and that in case of such sale they deliver the proceeds thereof to her, and take her receipt therefor, and file the same in the office of said Judge of probate." In place of the bond required by the Probate Court, it was ordered, upon her consent, that the widow file a bond with sufficient sureties for the maintenance and education of the children, and that an inventory of the property, real and personal, turned over to her by the executors, receipted by her, be also filed with that Court. It was further ordered that upon her death all of the property, or any part of the same left by her, or the proceeds thereof, be divided among the children, share and share alike.

The questions involved require a careful consideration of the several clauses of the will. A power of sale is vested in the executors, to be exercised in their sound discretion. They are, however, given no other authority or control over the property, and have no active trust to execute in or about the same. They have simply a naked power of sale, and the

title passed subject to the exercise of such power : *Tobias v. Ketchum*, 32 N. Y. 319, 329. As respects the real property, a life estate vested in the wife, and a remainder in fee in the children, subject to be defeated by a sale : Gen. St. 1878, c. 45, §§ 13, 33 ; *Ackerman v. Gorton*, 67 N. Y. 63. The same rule is applicable to the personalty ; and interests for life and in expectancy may be created and limited therein in the same manner : 2 Kent, \*353 ; 4 Kent, \*282 ; *Burleigh v. Clough*, 52 N. H. 267, 278 ; *Sampson v. Randall*, 72 Me. 109. In case of a sale of the property, the tenant for life and devisees or legatees in remainder would take the same interests in the proceeds, respectively, as they had in the property. The income would go to the widow, and the principal at her death to the children : *Ackerman v. Gorton*, *supra*.

The general rule applicable to the construction of wills is that the intention of the testator, as collected from the whole instrument, is to govern, provided it be not inconsistent with the rules of law. The purpose of the testator in this case was that his property should be used and preserved for the exclusive benefit of his family. Any construction which would permit any part of the estate to be diverted, for the benefit of strangers to his blood or affections, is inadmissible unless necessarily resulting from the terms of the will. To effect this purpose, the general scheme of testamentary disposition appears to have been to give his surviving wife a life estate in all his property, real and personal, with the right to enjoy the use and possession thereof, and to make a future provision for the children through an equal distribution thereof among them at her death, with a superadded provision for the support and education of the children.

1. The express provision or limitation of a life estate, with remainder over, so plainly defines the nature of the estate and interest intended to be given to the widow that the subsequent clauses cannot be construed as enlarging it into a fee, though the language used therein may create a charge or power of disposition in certain contingencies upon or over the capital fund. The general rule is stated by Chancellor KENT as fol-

lows : " If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee : " 4 Kent, \*535. " Words of implication do not merge or destroy an express life estate, unless it becomes absolutely necessary to uphold some manifest general intent : " *Ib.* \*319 ; *Burleigh v. Clough*, 52 N. H. 267, 277. This was the common-law rule, under which a devise to one generally, without words of inheritance, or otherwise indicating an intention to grant a greater interest, passed an estate for life only. An estate thus given generally, with a power of disposition, by implication carried the fee. But then, and now since the statute, an intention to convey a less estate, expressed or clearly implied, will control : 4 Kent, \*537 ; Gen. St. 1878, c. 47, § 2 ; *Jackson v. Robins*, 16 John. 537, 558, 559 ; *Johnson v. Battelle*, 125 Mass. 453 ; *Stuart v. Walker*, 72 Me. 145.

The contention that in this case the widow took any greater interest or estate than that of a tenant for life cannot be supported ; that is to say, the authority to use or dispose of any part of the property or principal, implied from the language of the will or the charge therein imposed for the support of the children, is the grant of a power and not of property : *Herring v. Barrow*, L. R. 13 Ch. Div. 144.

2. In the clause embracing the gift of the remainder to the children on the death of the wife, we find the words, " and which, or any part of the estate and property then left by her, shall be divided among my children. " This clearly implies a power to use some part of the principal or capital, if it should be found necessary, for the support of the widow and the maintenance and education of the children, so long as provision for such purpose should be reasonably necessary. This construction is warranted from the language in furtherance of the general purpose of the testator in making provision for his family. The use of such words in a devise after the limita-

tion of a life estate has given rise to a considerable discussion in the Courts, which seem more or less divided in opinion as to the effect to be given them. In *Blanchard v. Blanchard*, 1 Allen, 223, the Court thought that the words "that may be left at the death" of the life tenant added nothing, and meant simply the property left after the life estate had terminated; while the same Court, in *Paine v. Barnes*, 100 Mass. 470, conceded that under the authorities the words "if anything should remain," in a like case, implied a power of disposition by the life tenant. So, in *Johnson v. Battelle*, 125 Mass. 453, the words "whatever of said estate remains unexpended" implied a similar power of disposition, if it appeared necessary for the support of the life tenant. In *Green v. Hewitt*, 97 Ill. 113, 117, the words "whatever remains" were referred to the anticipated condition of personal property when turned over to the remainderman, some part of which would necessarily be worn out, lost, or consumed in the natural course of things during the tenancy of the first taker.

The construction in each case will, of course, turn largely upon the peculiar language used and its connection. Thus, in *Martin v. Eaton*, 57 N. H. 154, the words "remaining property," used after provisions for payment of debts and erection of grave-stones, gave no additional authority to the life tenant. The construction in *Green v. Hewitt* was doubtless too narrow, because, with the exception of items of perishable property, which it might, perhaps, be the duty of the life tenant to sell, convert into money, and invest, the grant of such personal property as might wear out and perish in the using during such tenancy would necessarily imply the right to so wear it out or consume it: *Martin v. Eaton*, *supra*. In some cases, also, good management would require that certain kinds of personal property, as stock or utensils on a farm, should be disposed of and replaced, the property substituted following the course of the original bequest: *Groves v. Wright*, 2 Kay & J. 347, 351, 352; 1 Schouler, Pers. Prop., § 140.

But in *Henderson v. Blackburn*, 104 Ill. 227, 232, it was held that the words "if there is anything left" implied a power of

disposal of the entire estate, or such part of it as might be necessary for the use of the life tenant. A similar conclusion was reached in *Clark v. Middlesworth*, 82 Ind. 240, 246, where the testator devised all his property, real and personal, to his wife during her life, "and at her death, should anything remain, the same to be divided among my heirs-at-law." So in *Brandow v. Brandow*, 66 N. Y. 401, on the death of the life tenant it was provided that all the estate, real or personal, which might "*be found then*" should be equally divided among the testator's children. There the property was given to the widow for life, and she was charged with the duty of caring for and educating the children. She was held entitled to use the *corpus* of the property, if necessary, for the support and education of the minor children. In this case the language, "and which or any part of the same then left by her," is sufficient to indicate an intention on the part of the testator to grant the right to use some portion of the *corpus* of the estate, upon the condition that it should be found necessary in order to give effect to the intention of the testator.

3. In respect to the provision for the support and education of the children by the life tenant, it is to be construed in connection with the clauses of the will which we have just been considering. Though the word "condition" is used, it is clear that the obligation on her part to provide for their support and education is a continuing one, at least as long as it should be reasonably necessary. If she consents to take under the will, she is bound by its provisions; and she is required to make such provision "out and from said property left her," in consideration of the gift and devise made to her. She is therefore to use the property for their benefit as well as her own. The property is charged in her hands as tenant for life; and as a devise of the use of property for life is a devise of the property for such term: *Farmers' Bank v. Moran*, 30 Minn. 165; so a charge upon the property so devised is a charge upon the rents, income, and profits issuing therefrom to which the life tenant is entitled. And, besides, the charge, though fastened upon the property in her hands, is also a personal

burden upon her. She is required to discharge this duty, and is responsible for it out of the devise or gift made to her: 4 Kent, \*540, note c; *Gardner v. Gardner*, 3 Mason, 178, 208; *Taft v. Morse*, 4 Met. 523. If the property remained unsold—as an improved farm, with stock and utensils, for instance, occupied by the family—the rents and products thereof, if sufficient for the support of all, should be so applied, and their support would thus be provided out of the property.

We think this construction best accords with the purpose of the testator as manifested by the several clauses of the will read together. That is to say, the income is to be applied to the support of the widow and maintenance and education of the children; and in case the same should prove insufficient, so much of the capital fund may be so used as shall be reasonably necessary therefor. She is not to use the principal while the income is sufficient. This intention would appear more clearly, perhaps, if the clause providing for the support of the children had immediately followed the devise to the wife; but it makes no difference in the construction of the will. The power to sell and convert the property is conferred on the executors, and not on the widow. This is not inconsistent with her right to appropriate such portion of the capital fund as may be proper. The clause granting this power to the executors operates as a restraint upon the power of disposition by the widow, but the several clauses must be construed together and in subordination to the purpose of the testator as manifested by the entire instrument, and the power given to the executors must be exercised so as to secure to her the benefit and enjoyment of the estate as provided by the will.

4. In such cases it is not the practice to require of the life tenant a bond as a condition of the delivery of the property, nor of its retention, unless there is danger of its being wasted, secreted, or removed. But an inventory should be filed, as was directed in this case, and the life tenant, upon a proper showing of real danger, may be called to account and required to give bonds. And doubtless her executors would be liable to account from her estate for any destruction or loss of the

principal caused by an abuse of her trust: 2 Kent, \*354; 1 Schouler, Pers. Prop., § 152; Sampson v. Randall, 72 Me. 109; Burleigh v. Clough, 52 N. H. 267, 283; De Peyster v. Clendinning, 8 Paige, 295; Jones v. Simmons, 7 Ired. Eq. 178.

The case is remanded, with directions to modify the judgment in conformity with this opinion, and charging the income of the estate primarily with the support and education of the children.

Sayward v. Sayward, 7 Me. 210; Throop v. Williams, 5 Conn. 100; Pearce v. Savage, 45 Me. 90; Moore v. Littel, 41 N. Y. 66; Leslie v. Marshall, 31 Barb. 560; Weehawken Ferry Co. v. Sisson, 17 N. J. Eq. 475; Boraston's Case, 3 Coke Rep. 20.

### *Contingent Remainders.*

**Contingent remainders are of two kinds: (1) Those limited to take effect either to a dubious or uncertain person, or (2) upon a dubious or uncertain event.**

#### *Uncertain Person.*

HUNT v. HALL.

Supreme Judicial Court of Maine, 1853.

37 Me. 363.

One having only a contingent interest in lands brings an action of waste against the defendant, who is acting under permission from the life tenant.

APPLETON, J. This is an action of the case in the nature of waste, and it is brought under the provisions of R. S., c. 129, §§ 4 and 5.

Ephraim Hunt, under whom the plaintiffs derive title, by his last will gave a life estate in the premises in which waste is alleged to have been committed, to his wife, and after her decease, directed that equal division should be made among all his children, and the heirs of such as might then be deceased, of all his property, both real and personal. The tenant for life is still living, and the defendant represents her estate.



The rights of the parties depend upon the nature of the estate, which was devised by the will of Ephraim Hunt, which was in the words following:—"After the decease of my dear wife, my will is that my executor, hereafter named, cause an equal division to be made among *all my children and the heirs of* such as may *then* be deceased." The persons who are to take are not those who are living at the death of the testator. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator, an heir might convey by deed his share of the estate, and if he should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provisions of the will, which provide that the estate should be divided "among his children and the heirs of such as may then be deceased." By the terms of the will, the estate is not to vest till after the death of the widow, and then the division is to ensue. Till then there is a contingency as to the persons who may take the estate.

"Contingent or executory remainders (whereby no present interest passes) are when the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious or uncertain *event*; so that the particular estate may chance to be determined and the remainder never take effect:" 2 Bl. Com. 169. In *Olney v. Hull*, 21 Pick. 311, the words of the devise were almost identical with those in the case now under consideration, and the Court held that until the death of the widow, it was uncertain, who would then be alive to take, and that therefore no estate vested in any one before that event happened. Where an estate is limited to two persons during their joint lives, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive: 2 Cruise's Dig. Title 16, Remainder, c. 1, § 21. So where one devised lands to his daughter H. and her

husband, for their respective lives, and after their death to the heirs of H., it was held that the remainder was contingent until the death of H., and then vested in the persons who were then heirs: *Richardson v. Wheatland*, 7 Met. 169; *Sisson v. Seabury*, 1 Sum. 235.

It is obvious that by the terms of the will, the plaintiffs took a contingent and not a vested remainder. They are not within the provisions of R. S., c. 129, and consequently are not entitled to maintain this action.

Exceptions overruled. Non-suit confirmed.

**To the same point.**

**OLNEY v. HULL.**

Supreme Judicial Court of Massachusetts, 1838.

21 Pick. 311.

The clause in the will on whose construction the rights of the parties depended was as follows: "I give to my dear and loving wife, as long as she remains my widow, the improvement of all my lands and buildings. . . . Should my wife marry or die, the land then shall be equally divided among my surviving sons, with each son paying \$60 to my daughters, to be equal divided among them, as soon as each son may come in possession of said land."

MORTON, J. The demandants, in right of the wife, claim an undivided portion of a certain farm in this county. The tenant claims the whole. These respective claims and titles will be examined, as far as may be necessary to the decision of the case. The farm in controversy was once the undisputed estate of Simeon Jones. In 1809 he made his will, which afterward was duly approved and allowed. Upon the *true construction* of that will must depend the rights of these parties.

Simeon Jones left *nine* children, *six* sons and *three* daughters. *Five* of the *six* sons died before their mother. One of the sons is now alive, under whom the tenant claims. The demandant's wife is one of two heirs of one of the sons who died before his mother. These facts raise the question whether this

will gave to the sons a *vested* or a *contingent* remainder. If the former, then the demandant's wife will be entitled to a moiety of the share which vested in her father before his death. If it was only a contingent remainder, to take effect on the death of the mother, then as the son died first nothing vested in him, and, of course, nothing descended to his heirs.

Fortunately it will not be necessary to enter very deeply into the discussion of the intricate and uninteresting doctrine of remainders. It is enough in the outset to state and carry with us into the investigation the well-established principle, that the law has no partiality for *contingent* remainders, but, in all cases of doubtful construction, leans toward *vested* remainders: *Dingley v. Dingley*, 5 Mass. R. 537. However, the intention of the testator is always to be the polar star to guide our inquiries. Whenever the meaning can be ascertained, it must govern, whether it result in *contingent* or *vested* remainders.

In this will it is perfectly clear that the testator intended to give to his wife the improvement of his farm during her life or widowhood. And having carved out this estate for her, he gave the remainder to his surviving sons, to be equally divided between them. Had he given generally to his sons, all who happened to be alive at his decease, viz., all who survived him, would have taken. This construction the demandants contended for. But if "*surviving sons*" meant those who outlived the mother, then, as one only survived her, he took the whole estate, which the tenant now holds under him. Perhaps the reason of the preference which the law gives to *vested* over *contingent* remainders could not be better illustrated than in this case. As several of the sons had families and left children, justice would seem to require that these grandchildren should partake of their ancestor's bounty, rather than the whole should go to one child in exclusion of all the other children and grandchildren. This certainly is a strong reason to influence the mind of the testator to induce him to give *vested* rather than *contingent* remainders. And it may lawfully

and properly influence our minds in cases of doubtful construction; because we should suppose it more probable that the testator intended the one than the other. But it can never authorize us to make a will for him. He says: "Should my wife marry or die, the land *then* shall be equally divided among my surviving sons." The time when the estate was to be divided among the sons is certain and definite. It was when the intermediate estate terminated by the death or marriage of the tenant. Among whom was it to be divided? Not those who survived any prior event, not those who survived the father; but those who survived that particular event, those surviving the death or marriage of the widow.

Had the testator intended to give to the sons who were alive at his own death, he would have said: "My sons who survive me, or whom I may leave, or who shall be alive at my decease." Or, if he had given to his sons generally, the effect would have been the same. It would be more plausible to suppose that he meant all the sons surviving the making of the will; but this would be an unnatural construction.

The provision, that each son should pay the daughters sixty dollars on coming into possession, cannot have much tendency to show that he intended to give a vested remainder. No doubt he expected that the sons would survive the mother, at least, more than one of them, and that the daughters would receive a much larger sum than sixty dollars. But it cannot be inferred that he intended the heirs of deceased sons should take portions; because if he had it must be presumed that he would have required the sons' heirs, as well as the sons themselves, to pay the sixty dollars to the daughters.

The construction of wills and other instruments depends so much upon the peculiar expressions used in each that not much aid can be derived from adjudged cases. Yet in the case of *Hurlburt v. Emerson*, 16 Mass. R. 241, the language used is so similar to this that it may well be referred to as being in point.

On the whole, we are clearly of opinion that the fair, and only fair construction of the language in the will gives the

estate to such sons as should survive the mother ; that until her death it was uncertain who would be alive to take, and therefore, that no estate vested in any one before that event happened ; and that, as one only survived her, the whole estate, on her death, vested in him. As nothing vested in the father of the demandant's wife, nothing descended to her ; and so this action cannot be maintained. We have not thought it necessary or expedient to inquire into the tenant's title, or to examine any of the questions growing out of the several levies of executions introduced into the case.

Demandants non-suit.

*Hitchcock v. Simpkins*, 58 N. W. 47 ; *Rutland v. Chessen*, 98 Ala. 435 ; 13 So. Rep. 606 ; *Armstrong v. Armstrong*, 54 Minn. 248 ; *Smith v. Rice*, 130 Mass. 441 ; *Bamforth v. Bamforth*, 123 Mass. 280 ; *De Lassus v. Gatewood*, 71 Mo. 371 ; *Chapin v. Crow*, 147 Ill. 219 ; 35 N. E. 536.

An estate in remainder vested in one's children will open to let in other children born before the particular estate terminates : *Waddell v. Waddell*, 99 Mo. 338 ; 12 S. W. 349.

### *Uncertain Event.*

MORSE *v.* PROPER.

Supreme Court of Georgia, 1889.

82 Ga. 13 ; 8 S. E. 625.

SIMMONS, J. On the 12th of January, 1855, L. S. Morse executed a deed conveying certain real and personal property to his step-mother, Mrs. Anna Morse, for and during her natural life ; the *habendum* and *tenendum* clause of the deed being as follows :

"The said Anna Morse to have and to hold said house and lot and said negroes and their increase, during her natural life, for her sole and separate use and benefit, free from the debts and liabilities of her husband, the said Oliver Morse, either heretofore made or hereafter contracted ; and after the death of the said Anna Morse, I give said property, real and personal, and its increase, to such of the children of the said Anna Morse by her present husband as may be living at her death, and the representatives of such as may be dead, in fee, the representative to take the share their

deceased parent would have been entitled to, had he or she been alive; but if the said Anna Morse should die without child or children or the representative of either, then the whole of the above-named property, with the increase, I give unto the said Oliver Morse in fee simple."

The deed appointed Oliver Morse trustee, with power to sell and reinvest for the purposes set forth. Oliver and Anna Morse had, at the time of the execution of this deed, a son, Daniel Morse, who was born on the 1st of January, 1854, and died on the 18th of July, 1868, and at his death was the only child; and none other was born to them. Daniel died without issue and before his father. The trustee sold the property conveyed by the deed, and reinvested the proceeds in real estate, taking deeds thereto in his name as trustee; and at his death he had on hand a certain dwelling-house and a storehouse and fifty acres of land. After the death of Daniel Morse, the child, on the 18th of July, 1868, Oliver Morse, on the 5th of August, 1868, made a will, by which he bequeathed to his wife, Anna Morse, "all and every interest, claim or title, either present or in expectancy, and all my real estate that I own individually, or as trustee for her." Oliver Morse died in a few days after making this will. Anna Morse lived until the 18th of November, 1887, when she died, leaving no child or children or representative of child or children, and leaving a will in which she bequeathed all her property of every character to her sister, Mrs. Sarah Proper, and making Mrs. Proper her executrix. Mrs. Proper undertook to carry out the will and to administer upon the property above described; and L. S. Morse, the grantor in the deed to Mrs. Anna Morse, filed a bill claiming that the property constituted no part of Mrs. Morse's estate, and that his father had no right to transmit the remainder interest to his wife by will or deed; that the remainder interest was "gone forever," and the property reverted to him, the original grantor; and that Anna Morse had no right to convey said property in her will to her sister, Mrs. Proper. He prayed an injunction restraining Mrs. Proper, the executrix, from interfering with his rights touching the property, and from exercising control

or management over it, and prayed for the appointment of a receiver, etc.

The defendant answered the bill, and claimed the absolute title to the property in dispute under her sister's will. She insisted in her answer that Oliver Morse had such an interest as he could dispose of by will, and that he devised it to his wife, Anna, and that Anna devised it to her, and that her title to and ownership of the property were absolute. The Chancellor refused the injunction prayed for by L. S. Morse, and the complainant excepted.

The question for decision in this case is, whether Oliver Morse had such an interest in this property at the time of his death, in 1868, as he could transmit by will to his wife. If he did have such a devisable interest, having devised it to his wife, and his wife having devised it to her sister (the defendant in error here), the Chancellor was right in refusing the injunction. It will be remembered that the deed from L. S. Morse to Anna Morse gave her this property for and during her natural life, and after her death it was to go to her children or the representatives of the children; and in case she died, leaving no children or representatives of children, the property was to go to Oliver Morse in fee. In our opinion, Oliver Morse, under this deed, took a remainder interest in this property. Was it a vested or a contingent remainder? The plaintiff in error contended that it was a contingent remainder, and that the contingency was as to the person, and therefore Oliver Morse, under § 2266 of the code, had no such interest in the property as he could devise to his wife. Counsel for the defendant in error contended (1) that Oliver took a vested remainder under the deed made in 1855, but that if it was a contingent remainder, the contingency was as to the happening of an event, and not as to the person, and therefore he had no right to devise it. This case was ably argued by counsel on both sides, and we have given it a great deal of consideration, and we think that Oliver Morse had such an interest in this property as he could devise to his wife, and therefore the Chancellor was

right in refusing the injunction. We think that under the deed he took a contingent remainder, and the contingency was as to the event, and not as to the person. The language of the code on this subject is as follows, § 2265 : " Remainders are either vested or contingent. A vested remainder is one limited to a certain person at a certain time, or upon the happening of a necessary event. A contingent remainder is one limited to an uncertain person, or upon an event which may or may not happen." Section 2266 : " If the remainderman dies before the time arrives for possessing his estate in remainder his heirs are entitled to a vested remainder interest, and to a contingent remainder interest when the contingency is not as to the person, but as to the event." The deed in this case declares that " if the said Anna Morse should die without child or children or the representative of either, then the whole of the above-named property, with the increase, I give unto the said Oliver Morse in fee simple." We think the contingency depended on the event of Anna Morse dying without children or the representative of children. The deed means, in our opinion, that in that event, or in that case, or when that particular thing should happen, Oliver Morse should take the property in fee. There was no uncertainty as to who should take if there were no children or representative of children living at the time of her death. The person to take in that event was certain, and was fixed by deed. In case there were no children or representative of children living at the time of Anna's death, the deed points unerringly to the person who would take, and declares that he should take in fee simple, which, under our law, means not only himself, but his heirs and assigns. If the deed had said that in case Mrs. Morse died without children or representative of children, then to the heirs or right heirs of Oliver Morse, the person to take in that event would have been uncertain ; or if it had said, in case of Mrs. Morse dying without children or representative of children, to the heirs of John Smith, the persons to take would have been uncertain ; but, as we have said before, the deed does not leave it uncertain who is to take in the event she died



without children or representative of children. It seems that in that case Oliver Morse is to take in fee simple. Oliver Morse having a contingent remainder interest in this property, did he have a right to dispose of it by will to his wife? We think he did. The old doctrine was, that contingent remainders were not devisable by the person entitled thereto; but that doctrine was abandoned many years ago, and it is now held almost universally that a contingent remainder is devisable where the contingency is not as to the person, but as to the event. Indeed, that is the principle announced in our code, § 2266. That section declares that if the remainderman dies before the time arrives for possessing his estate his heirs are entitled to a contingent interest, when the contingency is not as to the person, but as to the event. If the contingency be as to the person, and that person be not *in esse* at the time when the contingency happens, his heirs are not entitled. It is contended by counsel for the plaintiff in error that the latter part of this section controls the case; but we think we have shown that the contingency was not as to the person, but as to the event, and, therefore, the latter part of the section does not apply to this case.

Counsel for the defendant in error cited the case of *Loring v. Arnold*, 8 Atlantic Rep. 335 (Supreme Court of Rhode Island), the facts of which case, we think, are exactly the same as in the case now under consideration. In that case, it appears that Thomas Whipple died in 1843, leaving a will by which he devised certain real estate to his son James, "for and during his natural life, and at his decease, if he should leave any lawful child or children, then to them, their heirs and assigns forever; but if he should die without leaving any lawful child or children, then my will is that the same shall descend and be divided equally among his brother T., his sisters G., M., S., A., and J. A. B., to them, their heirs and assigns forever." J. A. B. died in Illinois in 1881, leaving by will all her estate in Rhode Island to C. E. B. James died in 1885, leaving no wife or children. It was held that J. A. B. had a contingent remainder, and that although this contin-

gency was not determined until after the death of J. A. B., yet the person who was to take being certain, the interest was descendible and devisable. So also in 2 Leading Cases in the American Law of Real Property, 374; Buzby's Appeal, 61 Pa. 111; Chess's Appeal, 87 Pa. 362; Fearne on Rem., 7th ed. 364-5; 4 Kent, 264; 2 Washb. Real Prop. 522.

The case of *Jackson v. Waldron*, 13 Wendell, 178, relied on so strongly by the plaintiff in error, was overruled in the case of *Miller et ux. v. Emmons et al.*, 19 N. Y. 384. The decision in the case of *Morehouse v. Wainhouse*, decided in 1767 and reported in 1 Blackstone's Reports, also relied on by the plaintiff in error, was put upon the peculiar circumstances of that case, and the facts of that case are different from the facts in this.

Judgment affirmed.

*Loring v. Arnold*, 15 R. I. 428; 8 Atl. R. 335.

The same kind of an interest may be created in a trust fund: *Cummings v. Stearns*, 161 Mass. 506.

## C

### The Rule in Shelley's Case.

HARDAGE v. STROOPE.

Supreme Court of Arkansas, 1893.

58 Ark. 303; 24 S. W. 490.

BATTLE, J. J. L. Stroope and wife conveyed the land in controversy to Tennessee M. Carroll, "to have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State." After this, Mrs. Carroll conveyed it in trust to James M. Hardage to secure the payment of a debt. She had two children born to her after the conveyance by J. L. Stroope

and wife, but they died in her lifetime. She died leaving no heirs of her body, but left her father, W. S. Stroope, surviving. After her death the land was sold under the deed of trust, and was purchased by Joseph A. Hardage. W. S. Stroope, the appellee, now claims it as the heir of Mrs. Carroll, and Joseph A. Hardage, the appellant, claims it under his purchase.

The rights of the parties depend on the legal effect of the following words contained in the deed to Mrs. Carroll: "To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State." Appellee contends that Mrs. Carroll only took a life estate in the land under this clause, and that he is entitled to the remainder, she having left no descendants. On the other hand the appellant contends that the remainder in fee vested in the children, and, when they died, Mrs. Carroll inherited it, and the whole estate in the land became vested in her; and that, if this contention be not true, the deed to Mrs. Carroll comes within the rule in Shelley's Case, and vested in her the estate in fee simple; and that in either event he is entitled to the land.

It is obvious that the deed to Mrs. Carroll created in her no estate in tail. Her grantor reserved no estate or interest, nor granted any remainder, after a certain line of heirs shall become extinct, but conveyed the land to her to hold during her life, and then to the heirs of her body in fee simple. No remainder vested in her children. It was to be inherited by the heirs of her body, and they were her descendants who survived her and were capable of inheriting at the time of her death. They might have been grandchildren. They were not the children, as they died in the lifetime of their mother.

The effect of the deed, as explained by the *habendum*, in the absence of the rule in Shelley's Case, was to convey the land to Mrs. Carroll for her life, and then to her lineal heirs, and, in default thereof, to her collateral heirs. As there can

be collateral heirs only in the absence of the lineal, the deed conveyed the land to Mrs. Carroll, in legal phraseology, for her life, and after her death to her heirs.

Two questions now confront us: (1) Does the rule in Shelley's Case obtain in this State? (2) And, if so, does the deed in question fall within it?

1. Is it in force in this State?

Section 566 of Mansfield's Digest provides: "The common law of England, so far as the same is applicable and of a general nature and all statutes of the British parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First that are applicable to our own form of government of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this State, shall be the rule of decision in this State unless altered or repealed by the General Assembly of this State."

The rule in Shelley's Case, as stated by Mr. Preston, which Chancellor KENT says is full and accurate, is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." Its origin is enveloped in the mists of antiquity. It was laid down in Shelley's Case in the twenty-third year of the reign of Queen Elizabeth, upon the authority of a number of cases in the year books. Sir WILLIAM BLACKSTONE, in his opinion in *Perrin v. Blake*, 1 W. Bl. 672, cites a case in 18 Edw. II as establishing the same rule. The earliest intelligible case on the subject, however, is that of *Provost of Beverly*, 3 Y. B. 9, which arose in the reign of Edward III, and substantially declared the rule as laid down in Shelley's Case.

Various reasons have been assigned for the origin of the

rule. Chancellor KENT, upon this subject, says: "The Judges in *Perrin v. Blake*, *supra*, imputed the origin of it to principles and policy deduced from feudal tenure, and that opinion has been generally followed in all the succeeding discussions. The feudal policy undoubtedly favored descents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from which he would have been exempted if he took the estate in the character of a purchaser. An estate of freehold in the ancestor attracted to him the estate imported by the limitation to his heirs; and it was deemed a fraud upon the feudal fruits and incidents of wardship, marriage, and relief to give the property to the ancestor for his life only, and yet extend the enjoyment of it to his heirs, so as to enable them to take as purchasers, in the same manner, and to the same extent, precisely, as if they took by hereditary succession. The policy of the law will not permit this, and it accordingly gave the whole estate to the ancestor, so as to make it descendible from him in the regular line of descent. Mr. Justice BLACKSTONE, in his argument in the Exchequer Chamber in *Perrin v. Blake*, does not admit that the rule took its rise merely from feudal principles, and he says he never met with a trace of any such suggestion in any feudal writer. He imputes its origin, growth, and establishment to the aversion that the common law had to the inheritance being in abeyance; and it was always deemed by the ancient law to be in abeyance during the pendency of a contingent remainder in fee or in tail. Another foundation of the rule, as he observes, was the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, and thereby giving him the power of disposition. Mr. Hargrave, in his observations concerning the rule in *Shelley's Case*, considers the principle of it to rest on very enlarged foundations; and, though one object of it might be to prevent frauds upon the feudal law, another and a greater one was to preserve the marked distinctions between descent and purchase, and prevent title by descent from being stripped

of its proper incidents, and disguised with the qualities and properties of a purchase. It would, by that invention, become a compound of descent and purchase—an amphibious species of inheritance—or a freehold with a perpetual succession to heirs, without the other properties of inheritance. In *Doe v. Laming*, 2 Burrows, 1100, Lord MANSFIELD considered the maxim to have been originally introduced, not only to save to the lord the fruits of his tenure, but likewise for the sake of specialty creditors. Had the limitation been construed a contingent remainder, the ancestor might have destroyed it for his own benefit; and, if he did not, the lord would have lost the fruits of his tenure, and the specialty creditors their debts.”

But, whatever may have been the cause of its origin, its effect has been “to facilitate the alienation” of land “by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease.” Its operation in this respect has commended it to the favorable consideration of the most learned and able men of Great Britain and the United States, and doubtless contributed to its preservation and continuance, and enabled it to survive the innovation of legislation and the changes and fluctuations of centuries. Based upon the broad principles of public policy and commercial convenience, which abhor the locking up and rendering inalienable any class of property, it has ever been in harmony with the genius of the institutions of our country, and with the liberal and commercial spirit of the age. Hence, it has been recognized and enforced as a part of the common law of nearly every State where it has not been repealed by statute: *Starnes v. Hill* (N. C.) 16 S. E. 1011; *Baker v. Scott*, 62 Ill. 88; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Doebler’s Appeal*, 64 Pa. St. 9; *Kleppner v. Laverty* 70 Pa. St. 72; *Polk v. Faris*, 9 Yerg. 209; *Crockett v. Robinson*, 46 N. H. 454; 4 Kent. Comm. marg. pp. 229–233; 2 Washb. Real Prop. (5th ed.) pp. 655–657.

The rule has never been changed in this State except in one respect—estates tail have been abolished. Section 643 of Mansfield’s Digest provides that, whenever any one would

become seized at common law "in fee tail of any lands or tenements by virtue of a devise, gift, grant, or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant, or conveyance." To this extent it has been repealed; in other respects it remains in full force in this State; and it was so held in *Patty v. Goolsby*, 51 Ark. 71, 9 S. W. 846.

2. Does this case come within the rule?

"Whenever there is a limitation to a man which, if it stood alone, would convey to him a particular estate of freehold, followed by a limitation to his heirs . . . (or equivalent expressions) either immediately, or after the interposition of one or more particular estates, the apparent gift to the heirs, . . . " according to the rule in *Shelley's Case*, "is to be construed as a limitation of the estate of the ancestor, and not as a gift to his heirs." The theory was that, in cases which come within the rule, the heirs take by descent from the ancestor, and they cannot do so unless "the whole estate is united, and vests as an executed estate of inheritance in the ancestor." This theory was based upon the fact that "the ancestor was the sole ascertained and original attracting object—the groundwork of the grantor's or testator's bounty"—and upon the presumption, arising from the fact that the grantor or testator, as the case may be, "meant the person who should take after the ancestor should be any person indiscriminately who should answer the description of heirs . . . of the ancestor, and be entitled only in respect of such description," and that the estate devised or conveyed should vest in them in that character only. "In order to effectuate this intent, and secure the succession to its intended objects," the rule rejects, as inconsistent and incompatible with this primary or paramount intent, "any other intent that the ancestor should take an estate for life only, and the heirs should take by purchase,"

and vests the estate of inheritance in the ancestor. This was considered necessary to accomplish the primary object of the grantor or ancestor: 2 Fearne, Rem., pp. 216-220.

"Hargrave has justly observed," says Fearne on Remainders, "that the rule cannot be treated as a medium for discovering the testator's intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that, when it is once settled that the donor or testator has used words of inheritance according to their legal import—has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus by reference to whom the succession is to be regulated—then the rule applies. But the rule is a means for effectuating the testator's primary and paramount intention, when previously discovered by the ordinary rules of interpretation—a means of accomplishing that intention to comprise, by the use of the word 'heirs' the whole line of heirs to the tenant for life, and to make him the terminus, by reference to whom the succession is to be regulated; and the way in which the rule operates as a means of doing this, is by construing the word 'heirs' as a word of limitation, or, in other words, by construing the limitation to the heirs, general or special, as if it were a limitation to the ancestor himself and to his heirs, general or special:" 2 Fearne, Rem., p. 221.

In Doeblor's Appeal, 64 Pa. St. 9, Judge SHARSWOOD, in discussing the rule in Shelley's Case, said: "If the intention is ascertained that the heirs are to take *qua* heirs, they must take by descent, and the inheritance vest in the ancestor. The rule in Shelley's Case is never a means of discovering the intention. It is applicable only after that has been discovered. It is then an unbending rule of law, originally springing from the principle of the feudal system; and, though the original reason of it—the preservation of the rights of the lord to his relief, primer seisin, wardship, and marriage—has passed away, it is still maintained as a part of the system of real property which is based on feudalism, and as a rule of policy. It declares inexorably that, where the ancestor takes a pre-



ceding freehold by the same instrument, a remainder shall not be limited to the heirs, *qua heirs*, as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder. Wherever this is so it is not possible for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention. This is a subordinate intent which is inconsistent with, and must therefore be sacrificed to, the paramount one. Even if he expressly provides that the rule shall not apply that the ancestor shall be tenant for life only, and impeachable for waste, if he interpose an estate in trustees to support contingent remainders, or, as in this will, declare in so many words that he shall in no wise sell or alienate, as it is intended that he shall have a life interest only, it will be all ineffectual to prevent the operation of the rule. No one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law."

"The policy of the rule," says Chancellor KENT, "was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers." 4 Kent. Comm. 216.

At common law the word "heirs" was necessary to convey a fee simple by deed. No equivalent words would answer the purpose. If the conveyance was not made to a man and his heirs, the grantee only took a life estate, notwithstanding the estate was limited by such phrases as "to A. forever," or "to A. and his successors," and the like. An express direction that the grantee should have the fee simple in the land would not have supplied the place of the word "heirs." But in this State the question as to what estate a deed to land conveys is determined by the intent of the parties, as ascertained from the contents of the deed and the power of the grantor to convey. When construed in this manner, it is obvious that the intention of the deed in question was to convey the land in

controversy to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. The intention that the heirs were to take only in the capacity of heirs is manifest. The deed comes within the rule in Shelley's Case. The estate of inheritance vested in Mrs. Carroll, and she became seized of the land in fee simple: 2 Washb. Real Prop. (5th ed.) p. 653.

"As a consequence from the foregoing principles, whoever has a freehold which, by the terms of the limitation, is to go to his heirs, may alien the estate, subject only to such limitation as may have been created between his freehold and the inheritance limited to his heirs:" 2 Washb. Real Prop. 651.

It follows then, that Mrs. Carroll had the right to convey the fee in the land in trust to secure the payment of her debts, and that a sale of such estate under the deed, and in conformity with law, was valid.

The decree of the Court below is reversed, and the cause is remanded for proceedings consistent with this opinion.

Smith v. Collins, 90 Ga. 411; 17 S. E. 1013; Henderson v. Walthour, 15 Atl. Rep. 893; Frank v. Frank, 17 Atl. Rep. 11; Van Olinda v. Carpenter, 127 Ill. 49; 19 N. E. 868; Hughes v. Nicklas, 17 Atl. Rep. 398; Howell v. Knight, 100 N. C. 254; 6 S. E. 721.

Rule abolished in Minnesota: Gen. Stats. 1878, ch. 45, § 28.

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## 2

### REVERSIONS.

**A reversion is an estate in expectancy arising from construction of law, and consists in "the residue of an estate left in the grantor or his heirs, or the heirs of a testator, commencing in possession on the termination of a particular estate granted or devised."**

#### BURDEN v. THAYER.

Supreme Judicial Court of Massachusetts, 1841.

3 Met. 76.

SHAW, C. J. Upon the case-stated, it appears that in 1833 William Capron, being owner of the estate, leased the same to the defendants for a term of twelve years from April 1, 1833,

at a rent of \$130, payable annually on the 1st of April each year during the term.

On the 5th of April, 1837, said Capron mortgaged the leased premises to the plaintiff, to secure the payment of \$2,250 in one year from date, which has never been paid. In May, 1837, the plaintiff gave notice of this mortgage to the defendants. The defendants have paid to the plaintiff the annual rents due April 1, 1838 and 1839, which accrued after the mortgage to the plaintiff; but they refuse to pay the rent due April 1, 1837, which became due and payable to Capron, the lessor, five days before his mortgage to the plaintiff; and the question is, whether the plaintiff is entitled to recover that year's rent.

The mortgage from Capron to the plaintiff described the premises as under lease to Thayer & Fairbanks for a term of years, and adds: "Should the conditions of the mortgage be broken, the rents, dues, and demands, of every kind arising out of said leased premises, due or becoming due, shall be paid to said Burden, his executor, and all the leases shall be assigned to him, and he is authorized to demand and receive the same in his own name, or that of said William Capron, and proceeds appropriated to the payment of said mortgage."

The Court are of opinion that the plaintiff has no right to recover the year's rent which fell due and was payable, and in arrear, when he took his deed of Capron. When a man takes a deed, either by way of absolute conveyance or mortgage, of an estate which is under a lease for years, he must take such estate as his grantor had; which, in that case, is a reversion—the estate subject to the lease. But the rent is incident to the reversion and passes with it, and the grantee or mortgagee, by force of the conveyance, has a right to receive all rent accruing upon the estate; it is a part of the realty and passes by the deed. But when rent is payable quarterly or yearly, the annual or quarterly payments are not to be apportioned. If the reversion is transferred before the time at which the rent becomes due, the right to such quarter's or year's rent passes with the reversion. In the present case,

had the year's rent become due five days after, instead of five days before, the mortgage to the plaintiff, it would have passed by it to the plaintiff. The rule is well expressed in Cruise's Digest, Tit. 28 c. 1, § 65. The right to a rent service is real estate descendible to the person who is entitled to the reversion. But from the moment that a payment of rent becomes due it will go to the lessor's executor.

Formerly, in order to constitute a privity of estate between the purchaser of the reversion and the lessee, so as to enable the former to maintain an action of debt for rent, attornment was necessary. But by St. 4 Anne, c. 16, § 9, a grant of the reversion is good and effectual without attornment: *Moss v. Gallimore*, 1 Doug. 279. That statute having been passed long before the Revolution and this provision being a rule in amendment of the common law, we may probably consider it in force here: *Commonwealth v. Leach*, 1 Mass. 61. But if otherwise, the rule itself is well established on the authority of long usage, and its adaptation to the more simple tenures which were in use under our former government: *Farley v. Thompson*, 15 Mass. 25, 26.

The general principle that all future accruing rent passes with the reversion is confirmed by the case of *Birch v. Wright*, 1 T. R. 378. These principles apply to all effectual conveyances of the reversion, whether by absolute deed or by mortgage. Then let us apply them to the case of a mortgage of an estate under lease, and with reference to other cases determining the relative rights of mortgagor and mortgagee.

It is now well settled that a mortgage in fee transfers presently all the title which the mortgagor has in the estate; and this includes the right to enter and hold possession of the estate, even though the mortgage is given to secure the payment of a debt at a future day, unless there is some stipulation that, until a breach of the condition, the mortgagor shall hold possession. In such case, the rents and profits of the mortgaged premises constitute a part of the fund pledged for the payment of the principal and interest of the debt to be secured; and must be accounted for by the mortgagee: *Newall v.*

Wright, 3 Mass. 138. But in such case, it is optional with the mortgagee whether he will enter or not; and, in general, if the estate is ample security for the debt and interest, it is not for the interest of the mortgagee to incumber himself with a liability to account; and therefore it commonly happens that in case of a mortgage in fee the mortgagor is left in possession.

But in case the premises at the time of the mortgage are under lease for a term of years, the mortgagee cannot disturb the possession of the lessee, who has a prior title; and therefore he cannot enter. But as the mortgage transfers the reversion, to which the rent is incident; as it binds the whole of the realty, of which the rents afterward accruing are a part; he may give notice of his right to the lessee and of his election to take the rents, and then the lessee becomes bound to pay the rent to him as mortgagee. But if he does not elect to take the rents and account for them, then, in analogy to the right of a mortgagee in fee to enter or not, at his election, the mortgagee of a reversion may forbear to give notice to the lessee; and in that case the lessee will be protected in paying the rent to the mortgagor. And so it seems to be provided by the statute of Anne before cited, that no tenant shall be prejudiced by the payment of rent to his landlord until he has notice of the transfer of the reversion. This, it is strongly intimated by Mr. Justice BULLER, in the case of *Birch v. Wright*, 1 T. R. 385, would have been the rule of the common law, if no such proviso had been expressed in the statute.

But it seems to be extremely well settled by the cases that the rent, which became due and was in arrear at the time of the assignment of the reversion, whether absolutely or by way of mortgage, was a part of the personalty due to him who had the reversion when it accrued, and did not pass to the grantee or mortgagee of the reversion: *Moss v. Gallimore*, 1 Doug. 279; *Birch v. Wright*, 1 T. R. 378; *Fitchburg Cotton Manuf. Corp. v. Melven*, 15 Mass. 268; *Demarest v. Willard*, 8 Cow. 206. To apply these rules to the present case, it results that at the time the rent now in question fell due, April 1, 1837,

William Capron was the holder of the reversion in his own right, and by force of the lease was entitled to the rent. It then became a debt to him, a chose in action, and did not pass by the mortgage to the plaintiff. But as the plaintiff did give notice to the tenant, in May, which was before another year's rent became due, he acquired a right to the rent which accrued April 1, 1838, although it was before condition broken. This, however, is stated on the assumption that there was no stipulation in the mortgage that the mortgagor should retain possession until condition broken. This is not stated in terms, but we take it for granted, though not now material to this case, because that year's rent has been paid into Court by the defendant.

But another ground is taken in argument, arising out of the special terms of the mortgage, as above cited. It is contended that, by force of that special clause, Capron assigned to the plaintiff rents, dues, and demands arising out of said leased premises, due or becoming due, etc. It may well be doubted whether this did not look to the contingency of the condition being broken by the non-payment of the debt, and means to transfer to the mortgagee such sums as should be then due. But the decisive answer is that this, if available at all, was nothing more than the assignment of a chose in action. The year's rent then due and in arrear was a debt, and though it arose out of the land, yet had become wholly detached from it. All the above authorities, which go to show that it had ceased to be part of the realty and that it did not pass by the conveyance of the land, establish the point that it was a mere chose in action. Being so, it cannot be recovered by the plaintiff in his own name, whatever equitable right he may have to claim it in the name of the assignee. See *Willard v. Tillman*, 2 Hill's (N. Y.) Rep. 274.

According to the terms of the report, the order must be that a new trial be granted; but as this opinion is decisive of the plaintiff's case, the proper course will be, if the plaintiff consent, to enter a non-suit.

The usual incidents of reversion at common law were fealty and rent: 2 Bl. Com. 176; *Condit v. Neighbor*, 13 N. J. L. 83.

## 3

## EXECUTORY DEVISE.

**An executory devise is such a limitation of the future estate or interest in land as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.**

PROPRIETORS OF THE CHURCH IN BRATTLE SQUARE *v.* GRANT  
*et al.*

Supreme Judicial Court of Massachusetts, 1855.

3 Gray, 142.

A house and land were devised to the deacons of a church and their successors forever, "upon this express condition and limitation, that is to say, that the minister or eldest minister of said church shall constantly reside and dwell in said house during such time as he is minister of said church; and in case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew J. H. and to his heirs forever."

BIGELOW, J. The interesting and important questions involved in the present case are now for the first time brought to our consideration. In a suit in equity between the same parties, which was pending several years ago in this Court, we were not called upon to give any construction to the clause in the will of Lydia Hancock, under which the deacons of the church in Brattle Square and their successors hold the estate now in controversy. The object of that suit was widely different from that of the present. The plaintiffs then assumed, by implication, that they were bound by the "condition and limitation" annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to sell the estate, solely on the ground that, from various causes, the occupation and use of the premises for a private dwelling, and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was that if a sale was authorized the proceeds might be invested in other real

estate, to be held on the same trusts and upon the like condition and limitation as are set out and prescribed in the will of the testatrix, relative to the estate therein devised to the deacons and their successors. It is quite obvious that on a bill thus framed no question could arise concerning the respective titles of the parties to the suit under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the Court in making a decree for a sale of the premises upon the reasons and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise, and render it necessary to determine the respective rights of the devisees and heirs-at-law to the estate in controversy. In order to decide the questions thus raised it is material to ascertain in the outset the legal nature and quality of the estate which is created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle Street. If the gift had been solely to the deacons of the church in Brattle Street and their successors forever, without any condition annexed thereto concerning its use and occupation, it would without doubt have vested in them the absolute legal estate in fee. By the provincial statute of 28 G. 2, which was in force at the time of the death of the testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate: *Anc. Chart.* 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors, and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect of the condition annexed to the gift; how far it qualifies the fee devised to the deacons and their successors; and what was the interest or estate devised over to John Hancock and his heirs forever, upon a failure to comply with and perform the condition. It will aid in the solution of these questions if



we are able in the first place to determine, with clearness and accuracy, within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor or deviser, and his heirs. Upon a breach of the condition the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs, or the heirs of the deviser, who alone had the right to take advantage of a breach : 2 Bl. Com. 156 ; 4 Kent Com. (6th ed.) 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the deviser. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over, by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills, to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger, upon an event which went to abridge or destroy an estate previously limited. A conditional limitation is therefore of a mixed nature, partaking both of a condition and of a limitation ; of a condition, because it defeats the estate previously limited ; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

There is a further distinction in the nature of estates on condition, and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition. .

One material difference therefore between an estate in fee on condition and on a conditional limitation is briefly this, that the former leaves in the grantor a vested right which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is

not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and, if so released, vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory and depending on a condition, or an event which may never happen passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over on the happening of the prescribed contingency to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or division may be comprehended every limitation which is to vest an interest in a third person on condition or upon an event which may or may not happen. Such limitations include certain estates in remainder as well as gifts and grants which, when made by will, are termed executory devises, and when contained in conveyances to uses assume the name of springing or shifting uses: 1 Preston on Estates, §§ 40, 41, 93; 4 Kent Com. (6th ed.) 128, note; 2 Fearn's Cont. Rem. (10th ed.) 50; 1 Pow. Dev. 192 and note 4; 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear upon

familiar and well-established principles. There is, in the first place, no particular estate upon the natural determination of which the limitation over is to take effect. The essence of a remainder is that it is to arise immediately on the termination of the particular estate by lapse of time or other determinate event, and not in abridgment of it. Thus a devise to A. for twenty years, remainder to B. in fee, is the most simple illustration of a particular estate and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A. until C. returns from Rome, and then to B. in fee constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A. and his heirs till C. returns from Rome, then to B. in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property is that where the event which gives birth to the ulterior limitation, determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate: 1 Jarman on Wills, 780; 4 Kent Com. 197. Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate: 4 Kent Com. 10, note; *Martin v. Strachan*, 5 T. R. 107, note; 1 Jarman on Wills, 792. All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate, which

is an estate less than a fee; and no remainder, because, the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen. For this reason the rule of the common law was established that a remainder could not be limited after a fee. In the present case the devise was, as we have already stated, a gift to the deacons and their successors forever; and they being by statute a *quasi* corporation, empowered to take and hold grants in fee, it vested in them, *ex vi termini*, an estate in fee, qualified and determinable by a failure to comply with the prescribed condition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders, by the rules of the common law. Indeed, the general and comprehensive definition of an executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of, or substitution for a preceding estate in fee simple is an executory devise: 4 Kent Com. 264; 1 Jarman on Wills, 778; Lewis on Perp. 72; 6 Cruise Dig. tit. 38, c. 17, §§ 1, 2; *Purefoy v. Rogers*, 2 Saund. 388 a, and note. Thus a limitation to A. and his heirs, and if he die under the age of twenty-one years, then to B. and his heirs, is an executory devise, because it is a

limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore, a deviser disposes of the whole fee in an estate to one person, but qualifies this disposition, by giving the estate over, upon breach of a condition, or happening of a contingency, to some other person, this creates an executory devise: 4 Kent Com. 368; 6 Cruise Dig. tit. 38, c. 17, § 2; Bac. Ab. Devise, I, 1 Fearné Cont. Rem. 399.

In the case at bar the devise is to the deacons and their successors in this office forever. By itself this gave to them an absolute estate in fee simple; but the gift in fee was qualified and abridged by the condition annexed, and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering it would seem to be very clear that the devise in question did not create an estate on condition, because the entire fee passed out of the deviser by the will; no right of entry for breach of the condition was reserved, either directly or by implication, to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which, by the rules of law, could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs, it remains to be considered whether there is anything in the nature of the gift over which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is whether the gift over is not made to take effect upon a contingency which is too remote, as violating the well-established and salutary rule against perpe-

tuities. Executory devises in their nature tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery or otherwise: 4 Kent Com. 266 ; 2 Saund. 388 a, note. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this Commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterward, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and nine months, are void as too remote and tending to create perpetuities: 4 Kent Com. 267 ; 1 Jarman on Wills, 221 ; 4 Cruise Dig. tit. 32, c. 24, § 18 ; *Nightingdale v. Burrell*, 15 Pick. 111 ; see, also, *Cadell v. Palmer*, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases on this subject. In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period ; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect: *Nightingale v. Burrell*, 15 Pick. 111 ; 4 Kent Com. 283 ; 6 Cruise Dig. tit. 38, c. 17, § 23. These rules are stated with great precision in 2 Atkinson on Conveyancing (2d ed.) 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior

estate was to determine, and the gift over take effect, might or might not occur within the life or lives in being at the death of the testatrix, and twenty-one years thereafter. The minister of the church in Brattle Square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes, within a year after the decease of the testatrix; but it is also true that it may be occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees, over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate, and contingent upon the will of a person who may at any time happen to be clothed with the office of eldest minister of the church in Brattle Square. It is difficult to imagine an event more indefinite as to the time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitations by executory devise, which are held void, as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A., who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendable: *Bacon v. Proctor*, Turn. & Russ. 31; *Mackworth v. Hinxman*, 2 Keen, 658, or depending on the contingency of no heir male or other heir of a particular person attaining twenty-one, no person being named as answering that description: *Ker v. Lord Dungannon*, 1 Dru. & War. 509; are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator de-



vised lands to trustees, and directed the yearly rents, to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes; and provided that in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or persons belonging to certain families, who, for the time being, should be lord or lords, lady or ladies, of the manor of Downpatrick; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency upon which it was to take effect was not restricted to the proper limits: *Commissioners of Charitable Donations v. Baroness De Clifford*, 1 Dru. & War. 245, 253. In this case Lord Chancellor SUGDEN says: "This is a clear equitable devise of a fee qualified or limited; a fee in the surplus rents for his family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case' (and I must here read the words 'in case' as if they were 'whilst,' or 'so long as'), certain persons protect the almshouse, etc.; and thus the limitation would assume the same character as that which is so familiar to us all, viz.: while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over, dependent on such an estate; a limitation after it is void, and cannot be supported; otherwise it would take effect after the time allowed by law." It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will, in that case, was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time after-

ward. It can make no difference in the application of the case cited that it was the gift of an equitable fee simple, because the limits prescribed to the creation of future estates and interest are the same at law and in equity: *Lewis on Perp.* 169; 4 Cruise Dig. tit. 32, c. 24, § 1; *Duke of Norfolk v. Howard*, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of *Welsh v. Foster*, 12 Mass. 97. It was there held that a limitation, in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the millpond [on the premises] should cease to be employed for the purpose of carrying any two mill-wheels;" and it was adjudged that the rule was the same as to springing and shifting uses created by deed, as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test, by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever.

Upon this point we understand the rule to be that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such cases is that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute: 1 Jarman on Wills, 200, 783; Lewis on Perp. 657; 2 Bl. Com. 156; 4 Kent Com. 130; Co. Lit. 206 a, 206 b, 223 a. The reason on which this rule is said to rest is that when a party has granted or devised an estate he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has been often held that when land is devised to A. in fee, and upon the failure of issue of A., then to B. in fee, and the first estate is so limited that it cannot take effect as an estate tail in A., the limitation over to B. is void, as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A., discharged of the limitation over. So it was early held that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir, then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee: *Tilbury v. Barbut*, 3 Atk. 617; *Tyte v. Willis*, Cas. temp. Talb. 1; 1 Fearné Cont. Rem. 445. So, too, if a devise be made to A. and his heirs forever, and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A. would take a fee simple absolute: *Nottingham v. Jennings*, 1 P. W. 25; 1 Pow. Dev. 178, 179; 2 Saund. 388 a, b; 1 Fearné Cont. Rem. 467; *Attorney General v. Gill*, 2 P. W.

369 ; *Busby v. Salter*, 2 Preston's Abstracts, 164 ; *Kampf v. Jones*, 2 Keen, 756 ; *Ring v. Hardwick*, 2 Beav. 352 ; *Miller v. Macomb*, 26 Wend. 229 ; *Ferris v. Gibson*, 4 Edw. Ch. 707 ; *Tator v. Tator*, 4 Barb. 431 ; *Conklin v. Conklin*, 3 Sandf. Ch. 64.

Such indeed is the necessary result which follows from the manner in which executory devises came into being and were engrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee simple, and in such case the estate became absolute in the first taker. This rule was afterward relaxed in cases of devises, for the purpose of effectuating the intent of testators, so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee. The remainder would have been void, and the fee simple absolute would have vested in the first taker : 6 Cruise Dig. tit. 38, c. 12, § 20 ; Co. Lit. 18 a, 271 b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee simple ; but a devise, to vest in derogation of an estate in fee previously devised, may under proper limits be good by way of executory devise. If, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless : *Shep. Touch.* (Preston's ed.) 417. It makes no difference in the application of this rule that the condition on which the limitation over is made to depend is not *mala in se*. It is sufficient that it is against public policy. Thus in a recent case, where estates were limited to A. for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A. did not during his lifetime acquire a certain dignity in the peerage, the gift to his heirs

male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy and therefore void, and that the estate vested in the eldest son of A. as heir male, discharged of the gift over: *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1. So in the case at bar the limitation over being upon an event which is too remote, and for that reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over to John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the *Touchstone*: "No condition or limitation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void;" "and the same law is for the most part of limitations, if they be repugnant, or against law, as is of conditions" in like cases: *Shep. Touch.* 129, 133. See, also, 4 H. L. Cas. 160.

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was, on a failure to use and occupy the premises as a parsonage in the manner described in the will, to give the estate of John Hancock and his heirs. But no principle is better settled than that the intent of a testator, however clear, must fail of effect if it cannot be carried into effect without a violation of the rules of law: 1 Pow. Dev. 388, 389.

It is to be borne in mind, however, in this connection that the claim set up by the heirs-at-law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by the residuary clause to John Hancock. Her heirs therefore can claim only by virtue of an arbitrary rule of law; and it certainly more accords with the general intent of the testatrix that the absolute title in this

estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs-at-law, whom she so carefully disinherited. The Court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited, in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over, to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause: 2 Pow. Dev. 102-104; *Hayden v. Stoughton*, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remain in the donor or devisor, which would pass under a residuary clause, or in case of intestacy, to the heirs of the donor; but it is the case of a devise in fee on a conditional limitation over, which is void in law. There is, therefore, no possibility or right of reverter left in the devisor, which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift. Nor does it make any difference in the application of this well-settled rule of law to the present case that the testatrix in terms declares that the gift to the deacons and their successors shall be void if the prescribed conditions be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law, if no such clause had been inserted in the will. It is simply a conditional limitation.

The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over. Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition; a clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is, strictly speaking, a limitation: 2 Cruise Dig. tit. 16, c. 2, § 30; Shep. Touch. 117, 126; Vent. 202; Carter, 171.

The case of *Austin v. Cambridgeport Parish*, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely different from the case at bar. That was a grant by deed of an estate, defeasible on a condition subsequent, which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee-simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates and interests capable of conveyance and constituting together an entire title or

estate in fee simple. This is very different from an executory devise, where only the conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain until after a breach of the condition, in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law, in the creation of the estate by the original grantor. The case of *Hayden v. Stoughton*, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and therefore within the prescribed period. In the case of *Brigham v. Shattuck*, 10 Pick. 306, the Court expressly avoid any decision on the validity of the devise over, and decide the case upon the ground that the demandant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate, upon breach of the prescribed condition, would not pass to John Hancock and his heirs by virtue of the residuary clause, nor would it vest in the heirs-at-law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void, as contrary to the policy of the law, by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix, in the deacons and their successors, and they hold it in fee simple, free from the divesting limitation.

A decree may, therefore be entered for the sale of the estate as prayed for in the bill, and for a reinvestment of the proceeds for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.



## 4

## RIGHTS NOT AMOUNTING TO AN ESTATE IN LAND.

## a

## Possibility of Reverter.

Where one grants a determinable fee, though he has a right to defeat the estate so granted on the happening of the contingency, he has no estate in the fee, but simply what is termed a "possibility of reverter."

NICOLL *v.* THE NEW YORK & ERIE R. R. CO.

Court of Appeals, New York, 1854.

12 N. Y. 121.

PARKER, J. The grant from Dederer to the Hudson & Delaware Railroad Company, bearing date the 1st day of July, 1836, was made to that company "and their successors." Under that grant there can be no doubt the Hudson & Delaware Railroad Company took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute: 2 Kent, 281; Co. Litt. 44 *a*, 300 *b*; 1 Kyd on Corp., 76, 78, 108, 115; 3 Pick. 239. And in this case the power was expressly conferred by the 9th section of the charter (Sess. Laws of 1835, p. 113); and by the 16th section there were given to it the general powers conferred upon corporations (1 R. S. 731), one of which is that of holding, purchasing, and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee; for the statute is now imperative, that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant: 1 R. S. 748, § 1.

But it is objected that because, by the act of incorporation, there was given to it only a term of existence of fifty years (Laws of 1835, p. 110, § 1), therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because, in his earthly existence, he is not immortal. Under such a rule, a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute: 1 R. S. 748, § 1. The change made by the statute favors the grantee, where there are no express terms in the grant, by presuming the grantor intended to convey all his estate.

At common law, it was only where there were no express terms, defining the estate in the conveyance, that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual, without such words, conveyed only a life estate. For the same reason a grant, without such words, to a corporation aggregate (Viner's Ab., Estate, L. 3), or to a mayor or commonalty (Ib. 3), conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and, in their

absence, we look, not to the term of existence of the grantee to ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All his estate is deemed to have passed by the grant: 1 R. S. 748, § 1.

All this is applicable only to cases where the grant is silent as to the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law, that "no implication shall be allowed against an express estate limited by express words:" Viner's Ab., Implication, A. 5; 1 Salk. 236.

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient: 5 Denio, 389; 2 Preston on Estates, 50. Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter:" 2 Kent, 282; 5 Denio, 389; 1 Comst. R. 509. Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence.

The Hudson & Delaware Railroad Company then, by their grant from Dederer, took a title in fee, but it was a fee

upon condition, there being in the grant an express condition that the road should be constructed by the company within the time prescribed by the act of incorporation. This was not a condition precedent, as was argued by the plaintiff's counsel, but a condition subsequent. The fee vested at once, subject to being divested on a failure to perform the condition. This is apparent from the language employed in the grant and from the character of the transaction. There are no technical words by which to distinguish between conditions precedent and subsequent. Whether a condition be one or the other is matter of construction, and depends upon the intention of the party creating the estate: 4 Kent, 124; 1 Term R. 645; 2 Bos. & Pull. 295; 3 Peters' U. S. R. 346. In the latter case, MARSHALL, C. J., said: "If the act (on which the estate depends) does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole instrument, the condition is subsequent." In this case it was evidently the design of the parties that the estate should vest at once, so that the grantee might proceed immediately with the construction of the road, otherwise a condition that it should be completed within a given time, or ever completed, would be impossible. From the character of the condition, it could not be a condition precedent. Possession and control of the land must necessarily accompany the construction and precede the completion of the road. The grant is not made to take effect on the happening of a certain event, but *in presenti*, and liable to be divested by the grantee's failure to perform the condition. See, also, 5 Ham. Ohio Rep. 389; 9 East R. 170; 5 Pick. R. 528; 18 Martin's Louis. R. 221; Co. Litt. 246, *b*. Kent says (4 Kent, 129): "Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates." They can only be reserved for the benefit of the grantor and his heirs, and no others can take advantage of a breach of them: 4 Kent Com. 122, 127; 2 Black. Com. 154. The plaintiff took his deed of the farm on the 1st of April, 1844. This was one year before the expiration of the time for constructing the

road and two years before the Hudson & Delaware Railroad Company conveyed to the defendants. At that time, therefore, there had been no breach of the condition; on the contrary, the right of the company was expressly recognized and reserved in the deed. Certainly, then, Dederer, when he conveyed, had no assignable interest.

A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest, as in the cases of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent. To that extent the law was changed in England by 32 Henry VIII, c. 34; and similar enactments have been made in several of the States. In this State, these provisions will be found at 1 R. S. 748, §§ 23, 24, and 25, and are limited to grants or leases in fee reserving rents, and to leases for lives and for years. As to other grants upon condition, the common law is unchanged: 2 Kent, 123.

There was a reason for the statutory change in the particular cases mentioned, for in them the grantor had an interest independent of the possibility of reverter. In the cases of a grant or lease in fee, though the grantor has no reversion, he has an interest by way of annual rents reserved, and in the cases of leases for lives and years, he has an actual reversion of what remains after the expiration of the particular estates. In these cases, therefore, he has a vested interest, and may well be permitted to assign with it, and his assignee to take with such interest, his right of entry for non-performance of a condition subsequent; for the right to enforce a forfeiture is necessary to the collection of the rents and to the protection and enjoyment of the reversion. But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the

grantor. There is simply a *possibility of reverter*, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. It has been said such possibilities were assignable in equity, but those were interests of a very different character, as I will presently show. So far from including these, Kent says (4 Kent's Com. 130): "A Court of Equity will never lend its aid to divest an estate for the breach of a condition subsequent," and the Chancellor acted upon that rule in *Livingston v. Stickles* (8 Paige, 398).

All contingent and executory interests were assignable in equity, and would be enforced if made for a valuable consideration: 4 Kent, 269. But these words had an ascertained legal signification, and it was never claimed that they were applicable to a case like that under consideration. It will hardly be pretended that Dederer's possibility of reverter was a contingent or an executory interest, in the legal sense of these words.

By the Revised Statutes (1 R. S. 725, § 35) expectant estates are descendible, devisable, and alienable, in the same manner as estates in possession, and it is claimed that Dederer had an expectant estate. But we are relieved from all doubt on this point, by the fact that the statute itself had furnished the definition of the term "expectant estates." They are described (1 R. S. 723, § 9) as including future estates and reversions, and these expressions are also defined in §§ 10 and 12. A future estate is one limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time. And by § 13 a future estate is said to be *vested*, where there are persons in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; and "*contingent*," whilst the person to whom or the event upon which they are limited to take effect remains uncertain. A reversion is defined as the residue of an estate left in the grantor or his heirs, or in the heirs of a testator,

commencing in possession on the determination of the particular estate granted or devised. I have been thus particular in transcribing these statutory definitions of "expectant estates," to show, what is apparent, that they are not in the least applicable to the case under consideration. Though, as Chancellor WALWORTH said (in 7 Paige, 76): "They include every *present right and interest*, either vested or contingent, which may by possibility vest at a future day," yet they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent. He has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living. The provision of the Revised Statutes, by which expectant estates are made alienable, no doubt covers the same class of interests which before were only assignable in equity. They are now assignable at law as well as in equity.

Kent says (4 Com. 370) that the grantor of an estate upon condition has only a possibility of reverter and no reversion; and in the note to page 11 of the same volume he says, "there is only the possibility of reverter left in the grantor and not an actual estate," citing *Martin v. Strachan*, 5 Term R. 107 (note). For examples illustrating the distinction between a naked possibility and a possibility coupled with an interest, see 4 Kent Com. 262, note *b*, and *Jackson v. Waldron* (13 Wendell, 178), and *Fortescue v. Satterthwaite*, 1 Iredell, N. C. R. 570.

Suppose A. sell to a banking corporation in fee, by express words, a lot of land on which to build a banking house. If the bank does not sell that land, but retains it to the expiration of its charter, it will revert to him, or, if he be dead, to his heirs. Now, what estate had A. after he had conveyed in fee to the bank? None whatever. He had only a possibility of a reverter—a naked and very remote possibility, but nothing that he could convey to an assignee. He had sold his entire interest and received the full value of it. The presumption was it would never return. The law would not favor its return, and the grantee, who enjoyed the entire estate

and upon whose volition alone it *could* return, would not be likely to so far neglect his own interests as to permit its return. A voluntary reconveyance would be hardly more improbable than a reverter. Just such an estate and no other had Dederer in this land when he conveyed to the plaintiff. In both cases the estates granted were upon condition. In the case of the bank the condition was implied in law: *Angell & Ames on Corp.* 128. In this case the condition was expressed.

What is meant by possibilities coupled with an interest is of a very different character, as may be seen by reference to 4 Kent Com. 262, and cases there cited, and 13 Wend., *supra*. Jicklings, in his treatise on the analogy between legal and equitable estates, says that under the generic term of possibilities coupled with an interest may be classed all contingent and executory interests in land, as springing and shifting uses, contingent remainders, and executory devises.

The cases cited by the plaintiff's counsel, for the purposes of showing that the common-law rule has been changed by the Revised Statutes have no applicability. In *Lawrence v. Bayard* (7 Paige, 70) the litigation was concerning personal property only, and the general remarks of the Chancellor, as to the extent of the change made by the Revised Statutes, I have already quoted.

Upon the whole, my conclusion in this case is that the Hudson & Delaware Railroad Company took from Dederer a fee upon condition subsequent; that at the time of the conveyance by Dederer to the plaintiff there had been no forfeiture, and that Dederer had, at the time of such conveyance, no assignable interest in the premises.

The judgment of the Supreme Court should be affirmed.



## b

## License.

**A license is an authority to do some act or series of acts on the land of another, *without possessing an estate in the lands*, as permission to fish, hunt, cut down trees, and do other like acts.**

## COOK v. STEARNS.

Supreme Judicial Court of Massachusetts, 1814.

11 Mass. 533.

This is an action for trespass on the plaintiff's lands, committed by the defendant, who went thereon to remove obstructions and to repair a mill and dam which had been formerly erected thereon with the consent of the owner.

PARKER, C. J. The question presented by the demurrer and joinder in this case is, whether the facts set forth in the plea in bar amount to a justification of the trespass complained of in the declaration.

The possession of the *locus in quo* is admitted to be in the plaintiff; and no title to it is claimed by the defendant in his plea. But he claims a right to enter upon it, for the purpose of repairing the dam and bank, and clearing the canal from obstructions; because those whose estate the plaintiff now holds permitted him to enter and make the bank, and dig the canal; from which permission he would infer a right to enter and use the soil as often as the state of the mill owned by him should require it. He has not described the mill as ancient, nor set up any prescriptive right to an easement in the close of the plaintiff; but alleges that he had the *consent, legally obtained*, to erect his works, of the former owner of the close; and because of that consent, the works being out of repair, he entered to make the necessary repairs.

It is evident, therefore, that the defendant claims a permanent interest in the plaintiff's close, a right to maintain the bank, dam, and canal, which he formerly placed there by consent, and to enter upon the plaintiff's close at any time to make necessary repairs. Now, this is an interest in land,

which cannot, by our statute of 1783, c. 37, pass without deed or writing; for all interests in land, according to that statute, whether certain or uncertain, are declared to be estates at will, unless the evidence of them exists in deed or writing: and if a continuation of the interest is intended for seven years, it must not only be passed by deed, but the deed must be acknowledged and registered in the same manner as is required in the transfer of a fee.

The defendant not having alleged that he acquired the right, which he claims, by deed or writing, his plea is for that cause bad. After a verdict, perhaps, this defect would be cured, because it would be presumed that the evidence, which the law requires to establish such an interest as is claimed, had been exhibited; but on demurrer, where a right in land is set up as a satisfaction for a trespass, the manner in which that right was acquired should be averred, that the Court may immediately determine whether it was a lawful conveyance of the right or not.

But the counsel for the defendant, aware that they could not set up any estate of a permanent nature in the plaintiff's close, without averring and proving a deed or some other lawful conveyance, have considered the facts alleged in his plea as amounting to a license, given him by the former owner of the land, to make the dam, bank, and canal; and they have contended, first, that such license may be by parol; and, secondly, that it is not in its nature countermandable; from which they would infer that a right continues in him to maintain the dam, etc., and to enter upon the plaintiff's close to repair them *toties quoties*, etc.

This argument had some plausibility in it when it was first stated; but upon more mature consideration, it seems to have no foundation in principles of law.

A license is technically an authority given to do some one act, or a series of acts, on the land of another, without passing any estate in the land; such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable when executory, unless a definite term is

fixed, but irrevocable when executed. See Viner's Abridgment, title License, A, E, D, G, and the authorities therein cited, which have been examined and found to support the positions laid down by the compiler. It is also holden, that such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses which in their nature amount to the granting of an estate for ever so short a time, are not good without deed, and are considered as leases, and must always be pleaded as such.

The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our statute. If the defendant had a license, from the former owners of the plaintiff's close, to make the bank, dam, and canal, in their land, this extended only to the act done, so as to save him from their action of trespass for that particular act; but it did not carry with it an authority, at any future time, to enter upon the land. As to so much of the license as was not executed, it was countermandable; and transferring the land to another, or even leasing it, without any reservation, would of itself be a countermand of the license. For although, when one is permitted to do certain things upon the land of another, an implied authority is given to enter upon the land to do the thing, and to repair it, if it is of a permanent nature, yet the first permission or license must be by grant, in order to draw after it this consequence.

We are also all satisfied, that the plea is in this respect bad; it not showing such a license as may be pleaded, and, indeed, the interest claimed being not in the nature of a license, but of an estate, or at least an easement in the land, which cannot be acquired without writing or prescription, or such a posses-

sion or use as furnishes presumption of a grant; neither of which is averred in this plea.

If the defendant's plea were held to be a bar to the action, all the mischiefs and uncertainties, which the Legislature intended to avoid by requiring such bargains to be put in writing, would be revived; and purchasers of estates would be without the means of knowing whether incumbrances existed or not on the land which they purchase.

It has been argued that, by the Act providing for the support and regulation of mills, a right to acquire property in the land of another, for the purpose of erecting or carrying on a mill, is contemplated to exist by parol. But that statute did not provide a mode of acquiring title to the mill or the land; but merely superadded the right of flowing land, upon compensation, according to the statute, by those who had legally obtained the right to build a mill.

The defendant's plea is adjudged bad.

### *Revocation.*

**A parol license to enter his premises—as, upon his lands, into his house, or into his theatre—may be revoked by the licensor at any time.**

### MCCREA *v.* MARSH.

Supreme Judicial Court of Massachusetts, 1858.

12 Gray, 211.

McCrea, a colored person, bought a ticket to a Boston theatre. When he presented himself he was refused admittance on the ground of his color and his entrance was forcibly prevented. McCrea brought an action of tort against the defendant for this exclusion by force.

METCALF, J. It was correctly ruled, at the trial, that the plaintiff could not maintain this action, and that his remedy, if any, was by an action of contract. We therefore need not express an opinion concerning any of the other rulings.

Assuming that the plaintiff, by purchase of the ticket from the defendant, obtained permission to enter the family circle

in the Howard Athenæum, in his own person, and occupy a place there during the exhibition, yet it was "only an executory contract." It was a license legally revocable, and was revoked before it was in any part executed. After it was revoked, the plaintiff's attempts to enter were unwarranted, and the defendant rightfully used the force necessary to prevent his entry.

According to the decision in *Wood v. Leadbitter*, 13 M. & W. 838, even if the plaintiff had been permitted to enter the family circle, the defendant might have ordered him to leave it, at any time during the exhibition, and, upon his refusal, might have removed him, using no unnecessary force. The doctrine of revocable licenses was there thoroughly discussed, and the authorities analyzed, by Mr. Baron ALDERSON, and the case of *Tayler v. Waters*, 7 Taunt. 374, and 2 Marsh. 551, was overruled. See, also, *Adams v. Andrews*, 15 Ad. & El. N. R. 296; *Roffey v. Henderson*, 17 Ad. & El. N. R. 574; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Jamieson v. Millemann*, 3 Duer, 255.

The plaintiff is doubtless entitled to recover, in an action of contract, the money paid by him for the ticket, and all legal damages which he sustained by the breach of the contract implied by the sale and delivery of the ticket.

Exceptions overruled.

*Wood v. Leadbitter*, 13 M. & W. 838.

### *Oral or Written.*

**This is true whether the license is oral or in writing, with consideration or without it.**

### JOHNSON *v.* SKILLMAN.

Supreme Judicial Court of Minnesota, 1882.

29 Minn. 95.

One Haynes owned land and gave permission to one Skillman to erect a dam near it to such a height that it would cause said land to be overflowed, provided that Skillman would erect and keep in operation a flouring mill where the dam was located; and Haynes also promised that this privilege

might continue so long as the mill was kept in operation. Relying on this, Skillman erected the dam and the mill. Afterward Haynes sold his land to Johnson, who knew at the time that the land was overflowed and also knew of the agreement between Haynes and Skillman. Johnson then brought an action to compel Skillman to remove the dam, or so much of it as should be necessary to prevent the overflowing of said land. The defendant claimed that he had a right to overflow the land under the agreement with Haynes so long as he kept up the mill.

VANDERBURGH, J. The parol agreement set forth in the decision of the trial Court created no easement in the land of plaintiff, but took effect as a parol license only. A license creates no estate in lands. It is a mere power or authority, founded on personal confidence, not assignable, and revocable at pleasure, unless subsidiary to a valid grant, to the beneficial enjoyment of which its exercise is necessary, or unless executed under such circumstances as to warrant the interposition of equity. This is the result of the best considered cases. The doctrine of the early cases, which converted an executed license into an easement, is now generally discarded as being "in the teeth of the statute of frauds." And, referring to these decisions, Mr. Chitty says, concisely: "However a Court of Equity might, under strong circumstances, interfere against such a party by injunction and decree a conveyance, it is clear that such a doctrine at law is not tenable." 1 Chitty, Gen. Pr. 339.

The cases of *Ricker v. Kelly*, 1 Me. 117, and *Clement v. Durgin*, 5 Me. 9, cited by defendants' counsel, have now little following, and the case of *Rerick v. Kern*, 14 Serg. & Rawle, 267, also relied on, which was an action at law for damages in favor of the licensee, is followed in but few States: *Houghtaling v. Houghtaling*, 5 Barb. 383; *Jamieson v. Millemann*, 3 Duer, 255; Washburn on Easements, 24.

A simple reference to some of the more important cases, in support of the views herein expressed, will suffice: *Cook v. Stearns*, 11 Mass. 533; *Mumford v. Whitney*, 15 Wend. 380; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 Dev. & Bat. (N. C.) 492; *Hazelton v. Putnam*, 3 Pin. (Wis.) 107; *Woodward v. Seely*, 11 Ill. 157; *Wood v. Leadbitter*, 13 M. & W.

838; *Wiseman v. Lucksinger*, 84 N. Y. 31. In cases where the license is connected with a valid grant, as of chattels or fixtures, upon the land of the licensor, susceptible of being removed, it is subsidiary to the right of property, and irrevocable to the extent necessary to protect the licensee, and saves to him the right of entry—the right of possession following the right of property: *Nettleton v. Sikes*, 8 Met. 34; *Heath v. Randall*, 4 Cush. 195; *Wood v. Leadbitter*, *supra*. But where it is sought to couple with a license a parol grant of an interest in the realty, the attempted grant being void, the transaction remains a mere license: *Wood v. Leadbitter*, *supra*. A license is, of course, always a protection for acts done under it, and before revocation: *Pierrepoint v. Barnard*, 6 N. Y. 279. In cases, however, of what are sometimes called negative easements, which are executed on the land of the licensee, a different rule prevails; as, where a man has an easement of light and air upon or over an adjacent lot, he may abandon the same, and license the erection, by his neighbor, of a building which shall extinguish such right, and the license become irrevocable: *Morse v. Copeland*, 2 Gray, 302; *Goddard on Easements*, 472.

Nor is it material that a mere license is or is not in writing, or upon a consideration. In *Jackson v. Babcock*, 4 John. 418, there was a sealed instrument, and in *Wiseman v. Lucksinger*, 84 N. Y. 31, there was both a writing and a consideration; but both were held licenses, and revocable. In such cases the question is one of interpretation as to the intent of the parties as evidenced by the writing, and, as Chancellor KENT remarks, the distinction between an easement and a license is sometimes quite subtle. And so, in a suit in equity brought to confirm rights and assure an interest, as upon a part-performance of a parol agreement alleged to be taken out of the statute of frauds (and otherwise void as a grant, but valid as a license), the question of interpretation of the terms of the agreement, and the intent of the parties, becomes a material one in the case: *Jackson & Sharp Co. v. Philadelphia, etc., R. Co.*, 11 Am. Law Reg. (N. S.) 374.

In the case before us the license has been revoked by the change in the title, with notice, however, to the grantee sufficient to bind him as to defendants' equities. As to equitable relief the affirmative is devolved upon the defendants to establish their right to it as claimed in the answer. The grounds upon which this is administered, whether it be for specific performance or be based upon estoppel for the prevention of fraud, are not exceptional or special to such cases as this, but the facts and circumstances must be such as to bring each case within established principles: *Jackson & Sharp Co. v. Philadelphia, etc., R. Co.*, *supra*, 381-2.

The form of the alleged agreement, as found by the Court, is that plaintiff's grantor verbally promised and agreed with defendants "that if they would erect a good custom mill" at a certain point, "he would give them the privilege of flowing his land so long as they would maintain such mill." Such an agreement might very properly be construed as intending to give an interest in the land, commensurate with a permanent right of occupancy thereof for mill purposes, and so be made the subject of equitable relief, on the basis of part-performance, had its terms been more definite. There may be specific performance in such cases, upon a proper showing, though the improvements and expenditures are entirely on the land of the licensee, and there be no other possession than that incident to the enjoyment of the privilege: *Brown on Stat. of Frauds*, § 466; *Story, Eq. Jur.*, § 759. Such a remedy is not, however, available here for several reasons.

In *Hazelton v. Putnam*, 3 Pin. (Wis.) 107, the Court refused this relief, on the ground that the terms of the agreement were not clearly and definitely established. So, here, the terms of the agreement are altogether too general and indefinite. Neither the height of the dam nor extent of flowage allowed appear. In the *second* place, the Court finds "that the defendants, relying on said agreement, and in part induced thereby," erected, on their own land adjoining, a dam and mill at great cost. In the absence of any supporting evidence, we are left to infer that they were also influenced by other con-



siderations in the matter. The rule is quite strict that the alleged part-performance must be founded on and be referable solely to the agreement: *Wheeler v. Reynolds*, 66 N. Y. 227; *Wolfe v. Frost*, 4 Sandf. Ch. 72. *Thirdly*, there is left to the parties their statutory remedy to secure the right of flowage. There is nothing in the case to show that this remedy is not an adequate one, and just to both parties. In such a case equity will not interfere. In *Wiseman v. Lucksinger*, 84 N. Y. 31, the Court lay stress upon the fact (in refusing equitable aid) that the plaintiff might reasonably secure drainage for his lot in another direction than the one in controversy, though attended with more expense and labor; and in *Meynell v. Surtees*, 3 Smale & G. 101, a case in point, the Court denied relief on the ground that while proceedings were pending in Court to enforce an agreement for the possession of land, the right to secure the privilege under an Act of Parliament had been obtained. See, also, *Bankart v. Tennant*, L. R. 10 Eq. 141.

Judgment affirmed.

*Contra*: *Snowden v. Wiles*, 19 Ind. 10; *Lacy v. Arnett*, 33 Pa. St. 169.

### *Effect of Conveyance.*

**Such revocation may be made by a conveyance of the land, and without notice to the licensee.**

WILSON v. ST. P., M. & M. RY. CO.

Supreme Court of Minnesota, 1884.

41 Minn. 56.

GILFILLAN, C. J. Block 1, Hopkins's addition to St. Paul, is bounded by Third, Fourth, Rosabel, and Broadway Streets, and the surface of the entire block was, at the time of the acts complained of, several feet below the surface of the surrounding streets. The land was wet. On it were springs, the water from which seems, unless carried off by drains, to have spread

over the surface of the block. The plaintiff was in possession, under a lease from the owner, of the north half of lot 5, which extended from Rosabel Street across the block to Broadway. On the west end of the half lot he had a building fronting on Rosabel Street, and occupied by himself as a hotel; on the east end he had another building fronting on Broadway, and occupied by a tenant of his. For the purpose of keeping the water drained off his premises he had constructed two drains—one on the half lot running east, and venting into the sewer under Broadway; the other running south, across that part of the block lying south of his half-lot and venting into the sewer under Third Street. No serious question seems to be made of his right to have and maintain the former of these drains. As to the other, it appears that, several years before the acts complained of, the then owner of the land across which it runs gave plaintiff oral permission (there being no consideration for the permission) to construct and maintain it. Pursuant to such permission he constructed the drain, and maintained it until the time of the acts complained of. After its construction the then owner of the land conveyed it to George C. Squires, and he conveyed it to defendant. Defendant also took a conveyance of plaintiff's half-lot, subject to his leasehold interest. In the fall of 1886 the defendant made preparations to erect a large building on the land thus acquired by it, and, as alleged by plaintiff, and as his evidence tended to prove, for that purpose it dug trenches, drove piles, destroyed the two drains, entered upon and injured plaintiff's half-lot. As a consequence of destroying the drains the water accumulated during the following winter on plaintiff's premises, and seriously injured the building occupied by him, and prevented his beneficial use of it. The main item of damage was that alleged to have been caused by so destroying the drains and causing the water to accumulate. The evidence indicates that the accumulation of water was mainly due to the destruction of the drain venting into the Third Street sewer. Hence the question of what liability was incurred by defendant by destroying that drain is important.

The plaintiff constructed and maintained that drain under a mere oral license from the owner of the land. Such a license is revocable at any time. This proposition follows necessarily from the law that interests in real estate cannot be created by parol. Such a license gives the licensee no right to continue doing what he is thus licensed to do, though, until revoked, it protects him from liability for acts done under it. To the rule that a parol license to enter on real estate is revocable there are some exceptions, though this case does not come within them. They save the right to the licensee, not to occupy the land permanently, but to do some single act upon it; as, if one sell a chattel situate on land of the seller, the purchaser to take it away, there arises by implication a license to the purchaser to enter upon the land for the purpose of removing the chattel, and this cannot be revoked until he has had a reasonable opportunity to do so. And a license to place a building on land cannot be revoked so as to prevent the licensee removing the building within a reasonable time. Where a license is revocable it is revoked by a conveyance of the land: *Harris v. Gillingham*, 6 N. H. 9 (23 Am. Dec. 701); *Cook v. Stearns*, 11 Mass. 533; *Bridges v. Purcell*, 1 Dev. & B. 492; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Seidensparger v. Spear*, 17 Me. 123 (35 Am. Dec. 234); *Carter v. Harlan*, 6 Md. 20. The license was therefore revoked by the conveyance of the original licensor, and, unless it was renewed by acquiescence of the grantee in the maintenance of the drain, it was entitled to cut no figure in the case.

The Court below, in its charge, treated the case as though the license had not been revoked. It charged that the owner of the property had the right to revoke it at any time, but qualified this with this instruction, to which there was a proper exception: "But if this drain was there upon the premises, had been there for years, and this defendant, when it went to improve, found it there, it was its duty either to give notice to the plaintiff that the license was revoked, or to take reasonable and proper means to prevent any damages arising from what it did in reference to stopping it up." This instruction as-

sumes that the existence of the drain on the defendant's land by mere naked license created a right in the licensee and a duty to him on the part of defendant that would prevent the latter using its land as, but for the existence of the drain, it might have done unless it first gave notice of a revocation. Under the evidence in the case, the jury must have understood this to mean express formal notice; for there could be little doubt on the evidence that the plaintiff had knowledge that the license had been revoked. Defendant had, with his knowledge, commenced on its land work, the prosecution of which necessarily prevented the continuance of the drain. It is probably true, in general, that the protection which the license affords the licensee in doing what it permits him to do continues until notice, so that he cannot be liable for acting under it until notice of revocation. This, however, has been held not to be the rule upon a revocation by a grant to a third person: *Wallis v. Harrison*, 4 Mees. & W. 538. We think the proposition in the charge is contrary to principle and authority—to principle because it attributes to a naked license the quality of creating a right which cannot be created by parol. Among the multitude of decisions on the subject of parol licenses we find but two precisely analogous to this: *Hewlins v. Shippam*, 5 Barn. & C. 221, and *Fentiman v. Smith*, 4 East. 107. In the former case the defendant had given plaintiff license to maintain a drain across his premises, and had without notice obstructed the drain, so as to prevent the water flowing through it. The action was for damages caused for so doing, and it was held that plaintiff could not recover, for that a right in the land could not be created by parol. The other case was similar to it, and there was a similar decision. As there will have to be a new trial for the error in this instruction, it is not necessary to consider any of the other exceptions, further than to say we see no error in them.

Order reversed.

*Harris v. Gillingham*, 6 N. H. 9.

*When Acted Upon.*

**Even if acted upon, and expenses are thereby incurred on the strength of the license, it may nevertheless be revoked.**

MINNEAPOLIS MILL CO. *v.* M. & ST. L. RY. CO.

Supreme Court of Minnesota, 1892.

51 Minn. 304.

MITCHELL, J. This action, which is one in ejectment, was before this Court on a former appeal: 46 Minn. 330 (48 N. W. Rep. 1132.)

On the first trial the District Court held that the defendant had acquired title by dedication to a public use. On the last trial it held, in substance, that it had acquired title through a parol contract or agreement with the plaintiff. The principal question is whether this finding was justified by the evidence.

It is conceded that the title to the land was originally in the plaintiff, and, of course, still is, unless it has in some way transferred it to the defendant. It is not pretended that the plaintiff ever executed any conveyance or any written agreement to convey to defendant; hence, if the title has ever passed, it must have been by virtue of matters entirely *in pais*.

The Court finds that during the year 1870, and for more than ten years thereafter, and until long after the defendant had taken possession of all the lands described in the complaint, and constructed its tracks thereon, William D. Washburn, C. C. Washburn, and Dorilus Morrison owned substantially all the capital stock of the plaintiff company, and, as its officers and directors, controlled its property, business, and affairs; that during the same time the plaintiff, its grantees and lessees, owned nearly all the water power and mill sites upon and along the west bank of the river at St. Anthony Falls; that during all of this time the two Washburns were stockholders and directors of the defendant company, and W. D. Washburn, as vice-president or president of the defendant, had on its behalf the management, control, and direction

of the location and construction of all its tracks, side tracks, and spur tracks upon the land in controversy, and upon or connected with the property of the plaintiff and the milling district in the city of Minneapolis. We assume that thus far the findings are supported by the evidence.

The Court then finds: "That during the same time the said plaintiff, by its said directors, for the purpose of increasing the value and availability for use of plaintiff's said property, and of increasing and hastening the development of manufacturing industries thereon, induced and procured the defendant to build and construct its railroad tracks upon the land described in plaintiff's complaint, and upon the agreement and understanding that, in consideration of the special benefits and advantages to plaintiff from such construction of defendant's tracks at that place, plaintiff would give to the defendant the possession and right of way for such tracks over such land of plaintiff, to be occupied by such tracks, as was not included in the deed of plaintiff to the defendant of May 31, 1871.

"That pursuant to such agreement and understanding, and at the instance of the Washburns, and with the full assent and knowledge of Morrison, and all other directors and officers of the plaintiff, and for the special benefit and advantage of the plaintiff, as well as for the use and advantage of the defendant, the defendant, at its own cost, built and constructed permanently all its tracks described in the complaint, and entered into the possession thereof, and has ever since occupied the same as part of its railroad connecting its main line with its yard on the east of said land in dispute, and also connecting said main line and yard with its tracks to mills upon plaintiff's milling property; and that defendant's railroad tracks upon said land in dispute have greatly facilitated the carrying on of milling and manufacturing on plaintiff's property, and greatly benefited and increased the value of such property.

"That upon the taking by said defendant at plaintiff's request, and constructing thereon for plaintiff's benefit, but at

its own cost, the railroad tracks of defendant, the plaintiff waived any further or other compensation for the land so taken than the special benefits to plaintiff's remaining property resulting from the construction and permanent use in that place of such railroad tracks. That, besides the cost of construction of said tracks, defendant has since, to the knowledge of plaintiff's directors and officers, expended large sums of money in repairs and replacement of such tracks and in construction of bridges for such tracks over said avenue (Tenth Avenue south), without any objection by plaintiff, or any notice that defendant's right to maintain and occupy said land permanently with said tracks was denied or disputed by plaintiff."

An examination of the record compels the conclusion that these findings, so far as material to the issues in the case, are not supported by the evidence.

There is no doubt of the correctness of the proposition announced by the trial Judge in his memorandum, that, if a landowner, in consideration of special benefits to his property to be derived from railroad facilities, agrees to give the right of way to a railroad company, and accepts such special benefits as full compensation, and the railroad company accepts the offer, and builds its road, and affords such special benefits, the contract is as binding as if the railroad company had paid for the right of way in money. But the difficulty in this case is that there is an entire lack of evidence of any such agreement. There is not an intimation by any witness that any express agreement to that effect was ever made. If found to exist, it must be wholly implied from the conduct of the parties. What the learned trial Judge probably meant was that the conduct of the plaintiff had been such as to estop it from now denying that there was such an agreement, and that consequently the situation is to be treated as equivalent to part performance of a parol agreement for the sale of an interest in real estate. \

But the case is equally lacking in the essential elements of an estoppel *in pais*. Doubtless the plaintiff was interested in having defendant's road extended down into the milling dis-

trict, thereby enhancing the value of its property. But the defendant was organized for pecuniary profit, and doubtless expected a return for its expenditures from the business to be obtained from the mills and other manufactories in that locality.

In view of this and the additional fact that the same men were the active managers of both corporations, it was naturally to be expected that they would to a certain extent work together for their common interests. But, as both were acting through the Washburns as their common agents, it can hardly be claimed that one was misled or deceived by the acts or conduct of the other.

It appears that in 1871 the defendant purchased of the plaintiff a tract of land south of the milling district proper for terminal grounds ; also, that other tracts in that vicinity were at different dates purchased of plaintiff by defendant. It also appears that in 1871 the defendant built a track down Second Street, to the terminal grounds already referred to, and that this track was the only one built until 1875 or 1876. It further appears that some condemnation proceedings were instituted to secure the right of way for this track ; but finally, on September 20, 1873, the plaintiff conveyed to defendant for right-of-way purposes a strip through its property thirty feet wide, being fifteen feet on each side of the centre line of this track. The boundaries between the lands of the plaintiff and those of the defendant were undefined, and undefinable except by actual survey. Subsequently to 1875 or 1876 additional tracks seem to have been built from time to time, as the increasing business of the railway company and of the mills in that vicinity required, some of which were outside of the land of the railroad company, and upon the land of the mill company, as subsequent surveys have proven. No witness testifies to any conversation or transaction pertaining to the building of any of these tracks, or to the facts or circumstances of the first occupation of the land in controversy by them. It does not appear that when they were built either plaintiff or defendant knew they were on plaintiff's land. In



fact, it affirmatively appears that when Washburn caused them to be constructed he supposed they were being built on the land owned by the railroad company, and that he did not knowingly or intentionally construct tracks upon land not acquired by it by contract or deed from the mill company. It also appears that the mill company did not know that the tracks extended over onto its land until a survey was made in 1886 or 1887. There is also an entire lack of evidence that the mill company either requested or induced the railway company to build these tracks where they are located or at all. The facts probably are that neither party knew exactly where the lines of their respective properties were, and that so long as their interests did not conflict neither was very particular to ascertain.

The most, we think, that can be possibly claimed from the evidence is that the tracks were built under a parol license from plaintiff; and there is nothing better settled than that a mere license, not subsidiary to a valid grant, may be revoked at pleasure, and does not create or transfer any interest in land, even though granted for a valuable consideration, and though the license may be for a purpose which involves the expenditure of money upon the faith of it. The mere fact that the mill company might have, without objection, permitted the railway company to expend large sums of money in building tracks on the land on the faith of the license would not operate as an estoppel. A licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the pleasure of the licensor; and if he expends money in connection with his entry upon the land of the latter he does so at his peril. Any other doctrine would render most licenses irrevocable, and make them operate as conveyances of an interest in land. As to private persons entering as licensees the rule is well settled everywhere. In some jurisdictions a partial exception seems to have been made in favor of railway companies, the Courts holding that if a railway company has entered and built its road under license from the landowner, he will be barred from maintaining ejectment, but will be left to

his action or proceedings to recover compensation for the permanent taking of the land. This seems to be placed on the ground that considerations of public policy forbid that the continuous operation of the road should be interrupted. But this distinction in favor of railway companies has been expressly repudiated by this Court for reasons stated in *Watson v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 321 (48 N. W. Rep. 1129).

The principle upon which Courts of Equity sometimes apply the doctrine of equitable estoppel to cases where the entry has been under a license is that the conduct of the licensor has been such that it would be a fraud on the licensee to permit the licensor to deny that there was a contract for an interest in the land, and hence they treat the case as one of a parol contract partly performed, which the Court will enforce. But in this case there was an entire absence, not only of any actual contract between the parties, but also of any fraud, deception, or misrepresentation. If neither party knew that these tracks were being built on plaintiff's land, of course there could have been no deception, nor could either party have been misled by the other. On the other hand, if both parties were aware of the fact, and the plaintiff gave defendant license, either express or implied from acquiescence to enter its land, there was still no deception or misrepresentation. All that defendant could complain of in such case is that plaintiff has seen fit to revoke a license, which, perhaps, the defendant thought would never be revoked.

Again, if any implied agreement as to defendant's occupancy of plaintiff's land could be inferred, the terms are so indefinite and uncertain as to the extent or character of the privilege given, if any, that it would be utterly impossible to determine what it was. How many tracks, or where to be located, no Court could possibly determine from any evidence in the case. The fact is that the entire evidence is of the most nebulous and illusive character. Throughout the entire case there seems to have been a commingling and confounding of various and independent entries upon plaintiff's land, as well as upon the land of other parties, at wholly distinct periods of

time, and an attempt to treat the evidence as to all as applicable to and determinative of the legal character of each, which could only be permissible if there had been some previous agreement between the parties under which all the entries had been made, and to which they were referable.

Without going further for authorities, it seems to us that under the present condition of the evidence the principles announced in *Watson v. Chicago, M. & St. P. Ry. Co.*, *supra*, and *Johnson v. Skillman*, 29 Minn. 95 (12 N. W. Rep. 149), are entirely decisive of this case.

2. Upon the question as to what land was conveyed by plaintiff to defendant by the deed of September 20, 1873, which depended upon the location at that date of defendant's original track, which was made the centre line of the strip conveyed, all we deem necessary to say is that the evidence fully justified the finding of the trial Court.

3. On the first trial the defendant produced a witness, one Fuller, who was examined and cross-examined, and his testimony taken down in full by the official reporter or stenographer of the Court. Upon the second trial, it being made to appear that Fuller was a non-resident of this State, and a resident of the State of Washington, and had at no time since the first trial been within this State, the Court, under the objection and exception of the plaintiff, admitted the testimony of the witness as given on the first trial. As to when the testimony of a witness given on a former trial of the same issues between the same parties should be admitted in evidence, the Courts, both English and American, are not entirely agreed. Starkie, in his work on Evidence (page 310), says the prevailing English rule is to admit the deposition of the witness, not only where it appears that he is dead, but in all cases where he is dead for all the purposes of evidence; as, where he cannot be found after diligent search, or resides in a place beyond the jurisdiction of the Court, or where he has become a lunatic or attainted.

In Greenleaf on Evidence (§ 163) the rule is laid down quite as broadly. This, however, has been criticised as too broad by

some Courts, which hold that, to make the testimony admissible, it must appear that the witness is dead, insane, or by physical disability at the time of the trial unable to be examined, or that he is absent by the act or procurement of the party against whom the evidence is offered, or that his whereabouts cannot be ascertained, so that by the exercise of due diligence his deposition could not be taken. See 1 Greenl. Ev., § 163, and note; 1 Phil. Ev. 393, and note 114.

The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The chief objections to hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine, neither of which applies to testimony given on a former trial. The real objection to such evidence is that it is only the testimony of some one else as to what the witness swore to on the former trial; and before the day of official reporters in our trial Courts the accuracy or completeness of such evidence depended entirely upon the fallible memory of those who heard the witness testify. It can be readily seen why, under such circumstances, Courts were disinclined to admit such evidence except in cases of actual necessity. But where the words of a witness as they come from his lips are taken down in full by an official Court stenographer, this objection does not apply. We do not see why such testimony is not as satisfactory and reliable as a new deposition, taken out of the State, would be. Rules on such subjects should be practical, and subject to modification as conditions change. We think the evidence was properly admitted, but for reasons already given the order appealed from must be reversed, and a new trial granted.

*Kremer v. R. R. Co.*, 51 Minn. 15; *Crosdale v. Lanigan*, 129 N. Y. 605; *Village of Dwight v. Hayes*, 37 N. E. Rep. 218.

*Exceptions.*

**But if the license is subsidiary to a valid grant, it is irrevocable.**

NETTLETON *v.* SIKES.

Supreme Judicial Court of Massachusetts, 1844.

8 Met. 34.

The plaintiff owned certain lands. He agreed that the defendant might cut down trees thereon and take away the bark to his own use. After defendant had cut the trees under the contract and peeled them, plaintiff forbade him to go upon the land and take the bark away; but not heeding this, defendant took away the bark, and plaintiff brings an action of trespass.

WILDE, J. We think it very clear that the instructions to the jury were correct, and are sustained by the authorities. Such an oral contract as was proved to the satisfaction of the jury, in this case, is obligatory on the parties, and is not within the statute of frauds: *Claffin v. Carpenter*, 4 Met. 583, and cases there cited. A beneficial license, to be exercised upon land, when acted upon under a valid contract, cannot be countermanded: *Tayler v. Waters*, 7 Taunt. 384; *Liggins v. Inge*, 7 Bing. 682; *Whitmarsh v. Walker*, 1 Met. 316.

In the present case, when the bark was peeled, it became the property of the defendant, by the terms of the contract; and if the plaintiff had taken it away, he would have been liable to the defendant in an action of trover. The bark being the property of the defendant, and being on the plaintiff's land with his consent, and in pursuance of the contract, he had no right to prevent the defendant from taking it away. See *Wood v. Manley*, 11 Adolph. & Ellis, 34.

Exceptions overruled.

A license is always a defense for acts done under it before revocation: *Pierrepoint v. Barnard*, 6 N. Y. 279. See, also, *Morse v. Copeland*, 2 Gray, 302.

*Equitable Estoppel.*

After a license has been given, and the licensee, through the fraudulent conduct, declarations, or concealment of the licensor, has incurred expenses of money, or otherwise, so that a revocation of such license would work a fraud upon the licensee, then *equity* will interfere and protect him under the doctrine of equitable estoppel.

JACKSON & SHARP CO. *v.* P., W. & B. RY. CO.

Court of Chancery, Delaware, 1871.

4 Del. Ch. 180; 11 Am. L. Reg. (N. S.) 374.

Jackson & Sharp erected car works on land adjacent to the railroad tracks in Wilmington, and applied to the railroad company for an extension of its track over the land of the company up to the car works. The application was granted, and the company constructed its track to the land of Jackson & Sharp, where the same was continued over the land of the latter to the shops. This track was used for seven years, and a controversy arising between the parties, the railroad company gave notice of its purpose to take up its track. Complainants file a bill in equity to enjoin the company from so doing.

THE CHANCELLOR. The claim made on the part of the complainants to the perpetual use of the side track in controversy as a legal right is based upon two grounds. One of these is, that the right was acquired by contract between their predecessors, Jackson & Sharp, and the Railroad Company—the other, that even were there, in the first instance, no contract, but only a permissive use of the track under a license, still, that the license, having been acted upon in the expenditure of large sums of money on the faith of its indefinite continuance, has become irrevocable under the doctrine of equitable estoppel.

First, is the question of contract. Here it may be well to notice, that the point to be inquired of is, not whether upon the application of Jackson & Sharp to the officers of the Railroad Company, a side track was promised and afterward laid, but whether the transaction included a stipulation by the company, express or implied, for the perpetual use of the side track by Jackson & Sharp and their assigns, as a right appur-

tenant to the car works. Now, in the view which I take of the facts, it becomes immaterial that the right claimed is an interest in real estate, such that under the statute of frauds a contract for it is required to be in writing; for it seems quite certain upon the proofs that there was no contract, either written or verbal, conceding to Jackson & Sharp and their assigns, the perpetual use of this side track as a right, or in any degree restricting the power of the Railroad Company, as owners of the soil, to take it up at their pleasure. The case—upon the question of express contract—rests upon the testimony of Mr. Jackson, of the firm of Jackson & Sharp, and Mr. Felton, the then President of the Railroad Company, who represented the parties in the original transactions and between whom the contract, if there was any, must have been effectuated. Both these gentlemen testify with evident candor and caution, and without any material discrepancy in their statements. The result of their testimony is, that at some time early in the commencement of the car-work enterprise, after the selection of the site for the works, but whether before or after their erection does not appear, Mr. Jackson on behalf of his firm applied to the officers of the Railroad Company for a connection between the car works and the railroad. The application was acceded to and after some delay the connection was made, deliveries of freight and manufactured cars being meanwhile effected by temporary expedients. Not a word, however, appears to have passed, intended to define the respective rights of the parties in the side track after it should be laid or to prescribe any term or condition of its continuance, whether, on the one hand, it should remain for the permanent accommodation of the car works as an easement appurtenant to them and beyond the power of the Railroad Company to terminate it, or whether, on the other hand, its continuance was to depend upon the mutual interest and good will of the parties. Mr. Jackson does not state that there was any stipulation for the permanence of the side track—not even that he understood such to be the purport of the promise to lay the track made in response to his application for it. Mr.

Felton, the President of the Railroad Company, under whose direction the connection was made, negatives any such stipulation by stating in substance, that he directed the connection in the usual course of the granting of such accommodations and subject to the general understanding in such cases, that the tracks forming the entire connection should remain under the control of the respective owners of the land on which different portions of it might be laid, without prejudice (as he must be understood to mean) to any right of property on either side. It may then be safely concluded that there was no express contract.

But it is argued that a contract may be implied from the acts of the parties. And the principle sought to be applied at this point of the argument was one announced by C. J. GIBSON, in the Pennsylvania cases of *Rerick v. Kern*, 14 S. & R. 267, and *Swartz v. Swartz*, 4 Barr, 353, that the grant of a privilege which is accessory to a permanent business is presumed to be commensurate in duration with the business, and although at first but a license and as such revocable, yet that when acted upon in the expenditure of money it becomes a contract for a valuable consideration, to be executed by a Court of Equity as a contract part performed. It will be observed, that this principle must depend, for its application to any particular case, upon the presumed intent of the parties that the privilege granted in such case should be commensurate with the business to which it might be accessory as a right, *in all events* and not as an arrangement depending upon the will of the parties for its continuance. Ordinarily, such a presumption may be a reasonable one. In the Pennsylvania cases it was clearly so. But after all, this presumption, or to speak more accurately, this inference as to the intent of the parties, is one controlled by the circumstances of the particular case, and may be wholly countervailed by evidence demonstrative that the privilege in question was in fact granted and accepted not as a perpetual, indefeasible right, but as a voluntary accommodation, to abide the good will and mutual interests of the parties. Such, in the present case, is the construction which



the evidence obliges me to give to the acts of the parties. As this view is the one decisive of the case, some explanation of the reasons for it is due to counsel.

In the first place, then, I lay out of consideration, as a ground for inferring the concession of a perpetual right to the use of this side track, the great value of such a right to the ownership of the car works. For opposed to this, as a ground for such an inference, is a consideration of hardly less force, which is the interest of the Railroad Company to preserve unimpaired its proprietary control over its road-bed and side tracks. And in addition to this, is its obligation as a public corporation, to keep its road, while held for the purposes of the incorporation, unincumbered by private rights or easements of a permanent nature, such as might under any circumstances embarrass its use as a public highway of travel—an obligation held in the late Pennsylvania cases, to be of so much force as to qualify the doctrine of *Rerick v. Kern*, that a license is presumed to be commensurate with the business to which it is accessary, so as to leave that doctrine not applicable to licenses by railroad companies affecting lands held by them to corporate uses: *Heyl v. The Philadelphia, Wilmington & Baltimore Railroad Company*, 5 Pa. St. 469; *Wunderlich v. The Cumberland Valley Railroad Company*, a late case in the Supreme Court of Pennsylvania, not yet reported. The principle of these cases does not go so far as to preclude a railroad corporation from granting private rights or easements in its lands, to be exercised subject to its paramount obligations to the public; but it offers a strong ground against presuming such grants in the absence of express stipulations—such as would be proper in order definitely to limit or qualify the rights granted, as rights subordinate to the public obligations of the company.

It is clear then that the relative interests of these parties, the one in acquiring and the other in withholding a perpetual easement in the side track, can afford no legitimate ground of inference as to whether or not the track was laid with an intent to confer such an easement. That is a question to be de-

terminated rather by the transactions between the parties than by their respective interests.

Taking up then, for this purpose, the evidence of the transactions between the parties, I am met at the outset by a fact of irresistible force, disclosed in the testimony of Mr. Felton, the then President of the Railroad Company, by whom the side track was directed to be laid, viz. : that the track was laid according to the usual course of granting such accommodations by the company to business establishments located along its road, it being the general understanding in such cases, that the continuance of the accommodation was to be voluntary on both sides, prejudicing no right of property in the soil, but leaving to the company the absolute control over its own track, with the like control in the owner of the connected works over the track laid upon his land. And it further appears that it was with this reserved control, tacitly understood by the parties concerned, that the connections similar to the one in question had been made between other works and this same side track, prior to its extension northward of Seventh Street to the car works of Jackson & Sharp—on which latter point Mr. Felton is corroborated by testimony drawn from the connected works below Seventh Street. Against the force of this evidence the testimony of Mr. Jackson, who acted for his firm, proves not only no stipulation with him varying the usage obtaining under other connections of this nature, but not even his own understanding or impression that the Railroad Company intended to concede the perpetual use of the side track as a right, or upon any other than the usual tenure of such accommodations, viz. : mutual interest and good will. And, then, in addition to all this, is something quite inexplicable, upon the theory of a negotiation looking to a perpetual connection with the railroad, as a legal right appurtenant to the car works, that is, the omission of Jackson & Sharp to seek a grant in writing, for securing a title so important ; and the omission of the Railroad Company also in the concession of a right so seriously affecting their property, to impose some written conditions touching the maintenance and mode of using the side

track. On the whole, gathering the intention of these parties, as we are left to do, from their acts, without any direct expression of it, I can construe this transaction only as a parol license for the permissive use of the side track, and not as a contract for the right, express or implied. Let us then proceed to consider the case in the aspect of a license.

On this branch of the case there are several material points upon which no controversy was raised in the argument. One of these is, that the right claimed for the complainant is to an easement or interest in the land of the Railroad Company, the claim being to the perpetual use of the side track as a right appurtenant to the car works, transmissible with the title to them, and binding the land of the company into whosoever hands it may come, at least so long as it shall be used for the purposes of a railroad. *Pitkin v. The Long Island Railroad Company*, 2 Barb. Ch. R. 221, is a case very similar. Further, it is agreed that *at law* an estate or interest in land can be created only by deed or grant under seal, or by prescription, or in this country by twenty years' adverse possession or user; *in equity* such an interest may additionally be acquired by contract, which, however, must, under the statute of frauds, be in writing, subject to an exception of the equity arising out of part performance of a verbal contract. Again, it must be admitted that a license or permission to exercise some privilege upon the land of the licensor can create no estate or interest in the land, such as binds the land and is transmissible from the licensee, the utmost effect of a license being to confer a personal privilege, which is not assignable or transmissible, and is revocable at the licensor's pleasure. Nor, does it matter whether the license be by parol or in writing, so long as it remains a mere license, not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel, as under some circumstances, to be presently noticed, it may be in equity though not at law. Few points have undergone more discussion, and have at length come to be better settled, than the insufficiency of a license at law to create or transfer

an interest in land. In England the leading cases are *Fentiman v. Smith*, 4 East, 107; *Rex v. Herndon on the Hill*, 4 M. & S. 565; *Hewlins v. Shippman*, 5 B. & C. 221 (11 E. C. L. 207); *Bryan v. Whistler*, 8 B. & C. 288 (15 E. C. L. 149); *Cocker v. Cowper*, 1 C. M. & R. 418, and *Wood v. Leadbitter*, 13 M. & W. 838, in which last case the prior course of decisions is very fully reviewed. In this country the same rule was adjudged, as early as 1814, by C. J. PARSONS, in *Cook v. Stevens*, 11 Mass. 533. He has been followed in many of the States: *Mumford v. Whitney*, 15 Wend. 384; *Foot v. The N. H. & Northampton Railroad Company*, 23 Conn. 214; *Foster v. Browning*, 4 R. I. 47; *Den. v. Baldwin*, 1 Zabriskie, 390; *Hays v. Richardson*, 1 G. & F. 38; *Carter v. Harlan*, 6 Md. 20; *Bridges v. Purcell*, 1 Dev. & Bat. 492.

But it was earnestly urged that although a license is revocable so long as it is executory and the parties remain *in statu quo*, it ceases to be so, under the doctrine of equitable estoppel, after it has been executed, the licensee having expended money or otherwise involved himself so that he cannot recede without prejudice; that in this case Jackson & Sharp having made large expenditures in erecting and afterward enlarging their car works upon the faith of their enjoying the continued use of this side track, the Railroad Company are equitably estopped from revoking the license.

Were this a case in a Court of Law, the answer would be that *at law* a license can under no circumstances become irrevocable by estoppel *when the effect would be to create an interest in land*. The doctrine of equitable estoppel, although largely adopted in Courts of Law and frequently so applied as to render licenses irrevocable, has been held not to apply to licenses, which, if rendered perpetual, would amount to an easement in lands. The reason is a plain and necessarily conclusive one, viz.: that Courts of Law do not recognize mere equities, such as arise out of an equitable estoppel enforced against the legal owner of lands; but they deal only with legal estates, such as are acquired through legal forms of conveyance, or their equivalent under the statute of limitations, an adverse

possession, of twenty years, or at least by writing under the statute of frauds. Hence, a mere license affecting lands is at law always revocable, even though granted for a valuable consideration, as in *Fentiman v. Smith*, 4 East, 107, and *Wood v. Leadbitter*, 3 M. & W. 833, and although the licensee may have expended money under it, which was a feature of many of the cases before cited.

It is true, however, that, in this Court, equities in land, though not created by any deed, grant, or writing whatever, but springing out of the acts and relations of the parties, are largely enforced, and among these a large class are those which arise under the doctrine of equitable estoppel applied to prevent constructive fraud—as where one having title to land is knowingly silent in the presence of an innocent purchaser from a third person, or where one knowing his title to land silently permits another ignorantly to build on it—in these, and in like cases, this Court, in order to prevent fraud will raise out of the transaction an equity in favor of the party misled, binding the conscience of the owner and restraining the exercise of his legal rights against such party. No reason is perceived why, in a proper case, the same principle should not in equity restrain the revocation of a privilege affecting the use of land. But it must be carefully observed that this principle of equitable estoppel proceeds upon the ground of *preventing fraud*. Its effect, when applied, is to restrain a party from exercising his legal right, and this even a Court of Equity cannot do unless there have been on his part some conduct, declaration, or improper concealment, misleading an innocent person to his prejudice and rendering the assertion of the legal right as against such person an act of bad faith, amounting to constructive fraud. Moreover, it may be well added that to warrant the interference of the Court with the legal right or title of a party, the case relied on to work the estoppel must be clear, beyond doubt, upon the facts. And the more stringently do these rules apply in a case such as this, where the effect of the estoppel, if allowed, will be to convert what was originally a bare privilege,

temporary and revocable, into an easement in the licensor's land, perpetually binding it and transmissible from the licensee.

It is a fatal infirmity in this branch of the complainant's case that there was nothing in all the communications had between the officers of the company and Jackson & Sharp, or in the conduct of these officers, to justify Jackson & Sharp in assuming that the company, by granting the accommodation applied for, intended to relinquish any right of property in the soil. It is agreed that no stipulation or promise to that effect was expressed. For reasons before fully stated and which need not be repeated, Jackson & Sharp were not warranted to infer so grave a concession by the company, as the relinquishment of its proprietary control over its soil, from the bare fact that on their application the side track was laid, nor from its importance as a right appurtenant to the car works; nor did the general usage connected with the granting of this sort of accommodation by the Railroad Company justify the inference that a perpetual easement in this track was conceded; but the usage was to the contrary. Looking to all the circumstances of the case, it is my conviction that although the connection of the car works with the railroad was doubtless contemplated on both sides as one to be in fact permanent, yet that no stipulation to that effect was asked or given, or supposed by either party to have been given; but that the arrangement was tacitly left to rest upon the general understanding with respect to such accommodations, Jackson & Sharp either not anticipating the contingency which has now happened, or trusting to the mutual interest and good will of the parties as a sufficient guarantee for the permanence of the connection, without securing it as a legal right according to prescribed forms of law. Their disappointment certainly involves them in no little hardship. But hardship is not a ground for equitable relief, except in favor of one who, without any negligence in securing his rights by the appropriate legal modes, has been misled to his prejudice through some fraud or laches of the party against whom the relief is sought,

or by such conduct of the latter as renders it an act of bad faith to take advantage of the mistake.

The injunction must be dissolved and the bill dismissed.

But many cases hold that a license is irrevocable simply if expenditures have been made on the strength of it: *Clark v. Glidden*, 60 Vt. 702; 15 Atl. Rep. 358; *Southwestern Ry. Co. v. Mitchell*, 69 Ga. 114; *Wilson v. Chalfant*, 15 Ohio, 248; *Hodgson v. Jeffries*, 52 Ind. 334; *Gibson v. St. L. Agri. & M. Assn.*, 33 Mo. App. 165; *School District v. Lindsay*, 47 Mo. App. 134.

## IV

ESTATES IN RESPECT TO THE NUMBER AND  
CONNECTION OF THEIR OWNERS.

## A

## ESTATES IN SEVERALTY.

One holds lands in severalty when he "holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein."—2 Bl. Comm. 179.

## B

## JOINT ESTATES.

Two or more persons may hold lands by the following tenancies:

## 1

## TENANCY IN COMMON.

"Tenants in common are such as held by separate and distinct titles but by unity of possession."—2 Bl. Comm. 191.

CARVER *v.* FENNIMORE.

Supreme Court of Indiana, 1888.

116 Ind. 236.

MITCHELL, J. Complaint by Esther J. Carver against Joseph Fennimore, in which the plaintiff alleged that the defendant was indebted to her in a specified sum for the one-third of the profit, use, and occupation of a certain lot or tract of land in the town of Alexandria, in Madison County.

Issues were made which were tried by a jury, who returned a verdict for the defendant.

The questions for decision will be understood by the fol-



lowing statement of facts: In 1857 Ira K. Carver, the plaintiff's husband, was the owner of eighty acres of land adjoining the town of Alexandria, which he conveyed by a deed of general warranty to his brother, William Carver. The plaintiff's name was signed to the deed without her knowledge or consent, and she remained in ignorance of the conveyance until after the death of her husband, which occurred in April, 1875. She then learned of the conveyance, and that her signature appeared on the deed, whereupon, on the 26th day of February, 1876, she instituted suit in the Madison Circuit Court against William Carver and about twenty others, who claimed different parcels of the land as grantees under him, to set aside the deed, for possession, and to have the title to the land quieted in her. This suit was pending in the Circuit Court until April, 1879, when the plaintiff recovered a judgment and decree against all the defendants in that suit, establishing and quieting her title to, and right to the immediate possession of, the undivided one-third of all the lands so conveyed, and for \$125 damages against William Carver. An appeal was taken to this Court, where the judgment was afterward affirmed on the 16th day of October, 1884: *Carver v. Carver*, 97 Ind. 497.

William Perry owned the lot, for the use and occupation of which the plaintiff seeks to recover in the present action, at the time the suit above mentioned was commenced, and he was duly summoned as a party thereto. Pending the suit Perry conveyed by warranty deed to Mrs. Fadley, who made valuable improvements on the lot, and who, subsequently, in April, 1880, while the appeal was pending in this Court, conveyed to the appellee, Fennimore. At the time the suit for possession was commenced the lot was unimproved, and the value of the use was merely nominal.

The question now is whether or not Fennimore is liable for the use and occupation of the land, and if he is, whether or not the rental value is to be estimated according to the condition of the land prior and without reference to the improvements placed thereon by his grantor pending the suit, or

whether he must account for the value of the use of the land with the improvements?

On behalf of the appellant it is contended that the only defense the appellee was legally entitled to make was as to the rental value of the property as it was when he had possession of it; that the judgment and decree in the former suit determined all questions as to the value of the improvements upon the real estate.

It may be conceded that the former judgment and decree settled conclusively all questions concerning the ownership of the land, and of the title to the improvements which had become a part of the freehold, whether such improvements existed thereon when the action was commenced or were made pending the litigation. This concession, however, does not dispose of nor materially affect the questions for decision in the present case. The effect of the decree in the former suit was to declare and conclusively establish the fact that the appellant was the owner of an undivided one-third of the property in dispute, and that she was entitled to occupy the legal relation of tenant in common with those who claimed title to the lot under the deed of her deceased husband. That question is no longer open to debate, but the rights and obligations of the co-tenants, as such, in respect to the improvement or enjoyment of the common estate, had not been adjudicated.

The relation of tenant in common arises "where two or more persons are entitled to land in such a manner that they have an undivided possession, but several freeholds, *i. e.*, no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with the others, or to receive his share of the rents and profits." *Rapalje & Lawrence Law Dict.*, tit. "Tenancy in Common."

That one tenant may exclude the other from or deny his title to the common estate does not destroy the legal relation or the respective rights and remedies of co-tenants, if they be in fact owners in common, nor does a decree establishing and quieting the title of the excluded tenant necessarily de-

termine the rights of the parties as regards an equitable accounting in an appropriate proceeding in respect to use and occupation, nor in respect to improvements made in good faith by the occupying tenant: *Carver v. Coffman*, 109 Ind. 547.

The decree conclusively establishes the fact of common ownership in the property, but it does not necessarily settle the equities between the parties growing out of the occupancy or improvement of the common estate.

Notwithstanding the statute, § 288, R. S. 1881, which declares in effect that a tenant in common may maintain an action against his co-tenant for receiving more than his share or just proportion, the settled rule is that a co-tenant can only be compelled to account in case he has actually received rents from a third person, or when he has entered upon and held exclusive possession of the whole estate in hostility to and to the exclusion of his co-tenant: *Humphries v. Davis*, 100 Ind. 369, and cases cited; *Carver v. Coffman*, *supra*, and cases cited; *Osborn v. Osborn*, 62 Texas, 495; *Edsall v. Merrill*, 37 N. J. Eq. 114; *Early v. Friend*, 16 Gratt. 21 (78 Am. Dec. 649, and note); *Kean v. Connelly*, 25 Minn. 222 (33 Am. Rep. 458).

It appears that the appellee and his grantors occupied the whole estate, denied the right of the appellant and contested her claim to an interest in the common property. She is, therefore, entitled, within the rule above declared, to an accounting for her just proportion of the use and occupation of the lot in controversy: *Freeman Co-Tenancy and Par.*, §§ 275, 277.

The instructions of the Court relevant to the features of the case above considered were substantially in consonance with the foregoing conclusions.

In refusing an instruction asked by the appellant and in the admission of evidence, the Court proceeded upon the theory that the liability of the defendant was to be determined upon the basis of the rental value of the property in the condition it was prior to the making of the improvements thereon

by the occupying claimants. This, the appellant contends, was an erroneous theory. The action by one co-tenant against another for an accounting for rents is a liberal and equitable action, and equitable defenses may be made, and in such a case, if the excluded tenant receives actual compensation for the damages sustained, he has no just ground of complaint. Unless, therefore, some peculiar circumstances are shown, the owner of an undivided interest in land who occupies the whole estate in good faith, under claim and color of title to the whole, and has made permanent and valuable improvements under the mistaken belief that he is the owner of the whole estate, is accountable only for the fair rental value of the property in the condition in which it was when it went into his possession.

The excluded owner or tenant is not, under ordinary circumstances, entitled to the enhanced rental value resulting from the improvements made with the capital of the *bona fide* occupant, or by his grantor from whom he purchased: *Morrison v. Robinson*, 31 Pa. St. 456; *Pickering v. Pickering*, 63 N. H. 468.

This rule is in analogy to that prescribed by the statute governing the rights and liabilities of occupying claimants, and has, besides, the support of reason and authority: *White v. Stuart*, 76 Va. 546, 567; *Early v. Friend*, *supra*.

The defendant, and his grantor who made the improvements, went into possession of the whole lot under a duly acknowledged and recorded deed, to which the plaintiff's name as well as that of her husband appeared to have been signed. It turned out that the plaintiff's signature thereto was without authority, and the persons in possession were the owners of only an undivided two-thirds of the property after the death of the husband. It could hardly have been expected that they would surrender the whole lot upon the institution of the suit by the plaintiff, notwithstanding the deed from Ira K. Carver and wife, which appeared to have been made in 1857, nor were they bound to have the property lie idle, unproductive and unimproved, or take the chance of paying

an enhanced value for the improvements which resulted from their own enterprise : *Ford v. Knapp*, 102 N. Y. 135 (55 Am. Rep. 782).

This results in no injustice to the plaintiff, while to adopt the measure of damages contended for would be inequitable and injurious to the defendant.

While a tenant in common who disseizes his co-tenant and makes improvements on the common estate may not be entitled to compensation for improvements so made, he is, nevertheless, entitled to have them considered when called to account in an equitable action for rents and profits.

There are no circumstances disclosed in the present case which equitably entitle the appellant to the rental value of the land with the improvements. What the rights of the parties may be in respect to the improvements in any other proceeding than the present is not here considered nor determined. These considerations lead to an affirmance of the judgment.

Judgment affirmed, with costs.

*Lamb v. Danforth*, 59 Me. 322.

## 2

### JOINT TENANCY.

Two or more persons may hold lands in fee simple, fee tail, for life, for years, or at will, as joint tenants, when they have "one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."

THORNBURG *v.* WIGGINS.

Supreme Court of Indiana, 1893.

34 N. E. Rep. 999; 135 Ind. 178.

DAILEY, J. This was an action instituted in the Court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel

Wiggins was the owner of a certain tract of real estate therein described, containing eighty acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate which they took and accepted, ever since have held, and now hold by entireties and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th "day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph Circuit Court for the sum of \$403.70 and costs, against one John T. Burroughs and the appellee, Daniel S. Wiggins, as partners, doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment and placed in the hands of the appellant, Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof, taken as the property of said appellant, Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded by the direction of said Howard and Gaston to advertise said real estate for sale under said execution and levy to make said debt, and did, on the 8th day of June, advertise the same for sale on the 3d day of July, 1886, and will, on said day, sell the same, unless restrained and enjoined from so doing by the Court; that said Daniel S. Wiggins has no interest in said premises, subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellee's title," etc.

The second paragraph is the same as the first, in substantial averments, except that in this paragraph the appellees set out

as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties.

The granting clause of the deed is as follows: "This indenture witnesseth, that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph County, in the State of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc.

Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the Court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers.

Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution. A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits, but, upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, for years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation and they cannot arise, except by the instrument providing for such tenancy: *Griffin v. Lynch*, 16 Ind. 396.

The 9th Am. and Eng. Ency. of Law, 850, says: "Husband and wife are, at common law, one person, so that when realty or personalty vests in them both equally . . . they take as one person, they take but one estate as a corporation would take. In the case of realty, they are seized not *per my et per tout*, as joint tenants are, but simply *per tout*; both are seized of the whole, and each being seized of the entirety, they are called tenants by the entirety, and the estate is an estate by entire-

ties. . . . Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seized of the whole, the estate is inseverable—cannot be partitioned; neither husband nor wife can alone affect the inheritance, the survivor's right to the whole."

This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are, at the time, husband and wife, commonly called estates by entirety." As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law: *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424.

Strictly speaking, estates by entireties are not joint tenancies: *Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412; the husband and wife being seized not of moieties, but both seized of the entirety *per tout* and not *per my*: *Jones v. Chandler*, 40 Ind. 588; *Davis v. Clark*, *supra*; *Arnold v. Arnold*, *supra*.

It has been said by this Court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants by the entirety. It is not even necessary that they be described as such or their marital relation referred to: *Morrison v. Seybold*, 92 Ind. 298; *Hadlock v. Gray*, 104 Ind. 596; *Dodge v. Kinzy*, 101 Ind. 102; *Hulett v. Inlow*, *supra*; *Chandler v. Cheney*, *supra*.

But the Court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations, in the conveyance, which clearly indicate the creation of a different estate: *Hadlock v. Gray*, *supra*; *Edwards v. Beall*, 75 Ind. 401.

Having its origin in the fiction or common-law unity of husband and wife, the Courts of some States have held that married women's acts, extending their rights, destroyed estates by entirety, but this Court holds otherwise: *Carver v. Smith*, 90 Ind. 222.

And the greater weight of authority is in its favor. Our



decisions hold that neither, alone, can alienate such estate : Jones *v. Chandler*, *supra* ; Morrison *v. Seybold*, *supra*.

There can be no partition : Chandler *v. Cheney*, *supra*.

A mortgage executed by the husband alone is void : Jones *v. Chandler*, *supra*.

And the same is true of a mortgage executed by both to secure a debt of the husband : Dodge *v. Kinzy*, *supra*.

And the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it : State, *ex rel.*, *v. Kennett*, 114 Ind. 160.

A judgment against one of them is no lien upon it : Barren Creek Ditching Co. *v. Beck*, 99 Ind. 247 ; McConnell *v. Martin*, 52 Ind. 434 ; Othwein *v. Thomas*, 13 N. E. Rep. 564.

Upon the death of one, the survivor takes the whole in fee : Arnold *v. Arnold*, *supra*.

The deceased leaves no estate to pay debts : Simpson *v. Pearson*, Admr., 31 Ind. 1.

And, during their joint lives, there can be no sale of any part on execution against either : Carver *v. Smith*, *supra* ; Dodge *v. Kinzy*, *supra* ; Hulett *v. Inlow*, *supra* ; Chandler *v. Cheney*, *supra* ; Davis *v. Clark*, *supra* ; McConnell *v. Martin*, *supra* ; Cox's Admr. *v. Wood*, 20 Ind. 54.

The statutes extending the rights of married women have no effect whatever upon estates by entirety : Carver *v. Smith*, *supra*.

Such estate is, in no sense, either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent : Enyeart *v. Kepler*, 118 Ind. 34.

The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property, with us, for eighty-six years.

Section 2922, R. S. 1881, provides that "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following

section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy."

Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife.

Under a statute of the State of Michigan, similar in all its essential qualities to our own, the Court held that "Where lands are conveyed, in fee, to husband and wife, they do not take as tenants in common:" *Fisher v. Provin*, 25 Mich. 347.

They take by entireties; whatever would defeat the title of one would defeat the title of the other: *Manwaring v. Powell*, 40 Mich. 371.

They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest, neither can be said to own an undivided half: *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Allen v. Allen*, 47 Mich. 74.

While the rule of entireties was predicated upon a fiction, the legislative intent, in this State, has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women: *Carver v. Smith*, *supra*.

"Where a rule of property has existed for seventy years and is sustained by a strong and uniform line of judicial decisions, there is but little room for the Court to exercise its judgment on the reasons on which the rule was founded. Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. It is evident that the Legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply

intended to enlarge, in some particulars, the separate power of the wife, which existed already under the Acts of 1852 and the year following. . . 'It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as joint tenants or tenants in common:'" *Carver v. Smith, supra*.

In *Chandler v. Cheney, supra*, the Court says: "It was a well-settled rule at common law, that the same form of words, which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted."

The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended.

Where a contrary intention is clearly expressed in the deed, a different rule obtains.

"A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose:" 1 *Preston on Estates*, 132; 2 *Blackstone's Com.*, Sharswood's note; 4 *Kent's Com.*, side page 363; 1 *Bishop on Married Women*; *Freeman on Co-Tenancy*, § 72; *Fladung v. Rose*, 58 Md. 13 (24).

"And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common:" *Stewart on Husband and Wife*, §§ 307-310; *Tiedeman on Real Property*, § 244.

"And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc.: *Hoffman v. Stigers*, 28 Ia. 310; *Brown v. Brown*, 32 N. E. Rep. 1128.

"So it seems that husband and wife may, by express words,

be made tenants in common by gift to them during coverture:" *McDermott v. French*, 15 N. J. Eq. 80.

In *Hadlock v. Gray*, 104 Ind. 596 (599), a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the Court says: "The language employed in the deed under examination plainly declares that Isaac and Mary Cannon are not to take as tenants by entirety. This result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. . . . The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife."

The Court further says: "It is true that where real property is conveyed to husband and wife jointly and there are no limiting words in the deed, they will take the estate as tenants in entirety. . . . But while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property, which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself, determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife."

The Court then adopts the language of Washburn, *supra*, and Tiedeman, *supra*.

In *Edwards v. Beall*, *supra*, the Court hold that when lands are granted husband and wife, as tenants in common, they will hold by moieties, as other distinct and individual persons would do.

If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife,

make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants. Because, by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties—joint tenancy would be superseded or put in abeyance by the estate created by law—tenancy by entirety.

The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy, or in common, if appropriate language be expressed in the deed or will creating it, and we know of no more apt terms to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy."

These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold not by entireties but in joint tenancy. A joint tenant's interest in property is subject to execution: Freeman on Ex. 125.

Judgment reversed, with instructions to the Circuit Court to sustain the demurrer to each paragraph of the complaint.

At common law a conveyance to two or more persons, in the absence of words to the contrary, created a joint tenancy: *Gilbert v. Richards*, 7 Vt. 203. See, also, *Coster v. Lorillard*, 14 Wend. 265, 336; *Mette v. Feltgen*, 148 Ill. 357; 36 N. E. Rep. 81.

Joint tenancy is not favored in law or equity: *Galbraith v. Galbraith*, 3 S. & R. 392.

## 3

## ENTIRETY.

**At common law the same form of words which, if the parties were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety, except where by statute the estate by entirety is abolished.**

WILSON v. WILSON.

Supreme Court of Minnesota, 1890.

43 Minn. 398.

Land was conveyed to "Alexander Wilson and Eleanor Wilson, husband and wife," to have and to hold "unto the said parties of the second part, their heirs and assigns forever."

GILFILLAN, C. J. The question in this case is, When a conveyance of real estate in fee is made to husband and wife, do they take as joint tenants, tenants in common, or do they become seized of the entirety, as it was called at the common law? An incident or property of this peculiar estate by the entirety, which it had in common with the estate in joint tenancy, was the right of survivorship. But, unlike the case of joint tenancy, neither of the parties could alien without the assent of the other. The reason for the rule upon conveyances to husband and wife, as given by Blackstone (book 2, c. 12, p. 182, Cooley's 2d ed.), was: "For, husband and wife being considered as one person in law, they cannot take the estate by moieties (that is, each taking an undivided half of the whole estate), but both are seized of the entirety *per tout et non per my*." It would seem as though, the reason for the rule having ceased, and unity, so far as rights of property are concerned, no longer existing, the wife being as capable of taking and holding property as though she were unmarried, and she and her husband being no more considered as one person in the law as to property, there could no longer be any foundation for the rule. And the statute has very clearly abolished that sort of tenancy—that is, by the entirety. The Revised Statutes of 1851 enacted (chapter 43):

"Sec. 43. Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which respectively shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter.

"Sec. 44. All grants and devises of land made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

"Sec. 45. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife."

It is not easy to see why § 43, if it stood alone, would not abolish any other classification of estates held by two or more persons, in respect to their connection, than that made by the section, and reduce them all to estates in severalty, in joint tenancy, and tenancy in common. As to whether such a section does have that effect the Courts in other States having similar statutes do not agree. But we are unable to see how full effect could be given to the language, as expressing the intention of the Legislature, than by holding that under that section alone there could be no such estate as by the entirety, and that upon a conveyance of the same tract to husband and wife they would take either as tenants in common or as joint tenants. How they would take, whether as tenants in common or joint tenants, would then be determined by § 44, were it not for § 45, which excepts from the operation of § 44 conveyances to husband and wife. Excepting such conveyances shows that in the mind of the Legislature they would come within the operation of § 44 unless excepted; that is, that the husband and wife would take as tenants in common unless in the grant or devise it should be expressly declared to be in joint tenancy. These sections of the statutes of 1851 remained until the revision of 1866. In that revision (c. 45) §§ 43 and 44 were retained without change. Section 45 was retained, leaving out the words, "or to husband and wife."

With that modification, the three sections are still in force, being §§ 43, 44, and 45 of chap. 45, Gen. St. 1878. The change made in 1866, by striking from § 45 the words, "or to husband and wife," leaving to apply to a grant or devise to them the rule which § 44 applies to all other grants or devises to two or more persons in their own right, was significant. It showed an intent that, upon a grant or devise to husband and wife, they should take and hold precisely the same as two or more other persons would upon a grant or devise to them; that is, as tenants in common, unless expressed to be in joint tenancy. Chapter 69 (of the revision of 1866) suggests a reason for it. Up to the time of that revision the common-law theoretical unity of husband and wife, and the common-law disabilities based upon it, continued. Upon the enactment of chapter 69 the unity of person, so far as related to rights of property, ceased to exist. After that the wife, with respect to taking, holding, and enjoying property, with some limitations, not based on any idea of her incapacity, but imposed to prevent frauds, was as though she were *sole*. The theoretical unity of person with respect to rights of property being done away with, it would have been inconsistent to retain any of the incidents of it. And we may suppose that, therefore, the Legislature in the same statute did away with a provision retained by reason of it, striking out the words, "or to husband and wife," from § 45, leaving applicable to grants or devises to them, the same rule that applies to grants or devises to two or more other persons in their own right.

Order affirmed.

But see: *Oglesby v. Bingham*, 69 Miss. 795; 13 S. Rep. 852; *Russell v. Russell*, 26 S. W. Rep. 677; *Noblitt v. Beebe*, 23 Or. 4; 35 Pac. Rep. 248; *Chambers v. Chambers*, 92 Tenn. 707; 23 S. W. Rep. 67; *In re Bramberry's Estate*, 156 Pa. St. 628; 27 Atl. Rep. 405.



## 4

## PARTNERSHIP ESTATES.

Where two or more partners purchase real property with partnership funds and for partnership purposes, they hold, as tenants in common, what may be termed an estate in partnership.

DYER *v.* CLARK.

Supreme Judicial Court of Massachusetts, 1843.

5 Met. 562.

SHAW, C. J. This is a suit in equity by the surviving partner of the firm of Burleigh & Dyer, established by articles of copartnership, under seal, for the purpose of carrying on the business of distillers. The principal question is one which has arisen in several other cases, and is this; whether real estate, purchased by copartners, from partnership funds, to be held, used, and occupied for partnership purposes, is to be deemed in all respects real estate, in this Commonwealth, to vest in the partners severally as tenants in common, so that on the decease of either, his share will descend to his heirs, be chargeable with his wife's dower, and in all respects held and treated as real estate, held by the deceased partner as tenant in common; or, whether it shall be regarded as *quasi* personal property, so as to be held and appropriated as personal property, first to the liquidation and discharge of the partnership debts, and to the adjustment of the partnership account, and payment of the amount due, if any, to the surviving partner, before it shall go to the widow and heirs of the deceased partner. This is a new question here, and comes now to be decided, for the first time.

There are some principles, bearing upon the result, which seem to be well settled, and may tend to establish the grounds of equity and law upon which the decision must be made. It is considered as established law, that partnership property must first be applied to the payment of partnership debts, and therefore that an attachment of partnership property for a partnership debt, though subsequent in time, will take precedence

of a prior attachment of the same property for the debt of one of the partners. It is also considered, that however extensive the partnership may be, though the partners may hold a large amount and great variety of property, and owe many debts, the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner or partners: 1 Ves. Sen. 242.

The time of the dissolution of a partnership fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners, and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection; and therefore much time may elapse, before the affairs can be wound up, the debts paid, and the surplus put in a condition to be divided. But whatever time may elapse before the final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interests of the partners in the fund.

When, therefore, one of the partners dies, which is *de facto* a dissolution of the partnership, it seems to be the dictate of natural equity, that the separate creditors of the deceased partner, the widow, heirs, legatees, and all others claiming a derivative title to the property of the deceased, and standing on his rights, should take exactly the same measure of justice as such partner himself would have taken, had the partnership been dissolved in his lifetime; and such interest would be the net balance of the account, as above stated.

Such indeed is the result of the application of the well-known rules of law, when the partnership stock and property consist of personal estate only. And as partnerships were formed mainly for the promotion of mercantile transactions, the stock commonly consisted of cash, merchandise, securities, and other personal property; and therefore the rules of law governing that relation would naturally be framed with more especial reference to that species of property. It is therefore

held, that on the decease of one of the partners, as the surviving partner stands chargeable with the whole of the partnership debts, the interest of the partners in the chattels and choses in action shall be deemed so far a joint tenancy as to enable the surviving partner to take the property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money, and the debts are paid ; though, for the purpose of encouraging trade, it is held that the harsh doctrine of the *jus accrescendi*, which is an incident of joint tenancy, at the common law, as well in real as in personal estate, shall not apply to such partnership property ; but, on the contrary, when the debts are all paid, the effects of the partnership reduced to money, and the purposes of the partnership accomplished, the surviving partner shall be held to account with the representatives of the deceased for his just share of the partnership funds.

Then the question is, whether there is anything so peculiar in the nature and characteristics of real estate, as to prevent these broad principles of equity from applying to it." So long as real estate is governed by the strict rule of the common law, there would be, certainly, great difficulty in shaping the tenure of the legal estate in such form as to accomplish these objects. Should the partners take their conveyance in such mode as to create a joint tenancy, as they still may, though contrary to the policy of our law, still it would not accomplish the purposes of the parties ; first, because either joint tenant might, at his option, break the joint tenancy and defeat the right of survivorship, by an alienation of his estate, or (what would be still more objectionable) the right of survivorship at the common law would give the whole estate to the survivor, without liability to account, and thus wholly defeat the claims of the separate creditors, and of the widow and heirs of the deceased partner.

But we are of opinion, that the object may be accomplished in equity, so as to secure all parties in their just rights, by considering the legal estate as held in trust for the purposes of the partnership ; and since this Court has been fully em-

powered to take cognizance of all implied as well as express trusts, and carry them into effect, there is no difficulty, but on the contrary great fitness, in adopting the rules of equity on the subject, which have been adopted for the like purpose, in England and in some of our sister States. And it appears to us, that considering the nature of a partnership, and the mutual confidence in each other, which that relation implies, it is not putting a forced construction upon their act and intent, to hold than when property is purchased in the name of the partners, out of partnership funds and for partnership use, though by force of the common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate, until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes, by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other, until the debts, obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him. This mutual equity of the parties is greatly strengthened by the consideration, that the partners may have contributed to the capital stock in unequal proportions, or indeed that one may have advanced the whole. Take the case of a capitalist, who is willing to put in money, but wishes to take no active concern in the conduct of business, and a man who has skill, capacity, integrity, and industry to make him a most useful active partner, but without property, and they form a partnership. Suppose real estate, necessary to the carrying on of the business of the partnership, should be purchased out of the capital stock, and on partnership account, and a deed taken to them as partners, without any special provisions. Credit is obtained for the firm, as well on the real estate as the other property of the firm. What are the true equitable rights of the partners, as resulting from their presumed intentions, in such real estate? Is not the share of each to stand pledged to the other, and has not each an equit-

able lien on the estate, requiring that it shall be held and appropriated, first to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest, indirectly, in the same appropriation; not because they have any lien, legal or equitable (2 Story on Eq., § 1253) upon the property itself; but on the equitable principle, which determines that the real estate, so held, shall be deemed to constitute part of the fund from which their debts are to be paid, before it can be legally or honestly diverted to the private use of the partners. Suppose this trust is not implied, what would be the condition of the parties, in the case supposed, in the various contingencies which might happen? Suppose the elder and wealthy partner were to die: The legal estate descends to his heirs, clothed with no trust in favor of the surviving partner. The latter, without property of his own, and relying on the joint fund, which, if made liable, is sufficient for the purpose, is left to pay the whole of the debt, whilst a portion, and perhaps a large portion, of the fund bound for its payment, is withdrawn. Or suppose the younger partner were to die, and his share of the legal estate should go to his creditors, wife or children, and be withdrawn from the partnership fund; it would work manifest injustice to him who had furnished the fund from which it was purchased. But treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound; and subject to this, all those will take, who are entitled to the property; namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner.

It may happen that real estate may be so purchased by partners, and out of partnership funds, in such manner as to preclude such implied trust, and indicate that the parties intended to purchase property to be held by them separately for their

separate use ; as where there is such an express agreement at the time of the purchase, or a provision in the articles of co-partnership, or where the price of such purchase should be charged to the partners respectively, in their several accounts with the firm. This would operate as a division and distribution of so much of the funds, and each would take his share divested of any implied trust. If, in the conveyance, the grantees should be described as tenants in common, it would be a circumstance bearing on the question of intent, though perhaps it might be considered a slight one ; because those words would merely make them tenants in common of the legal estate, which, by operation of law, they would be without them. But, as we have already seen, such legal estate is not at all incompatible with an implied trust for the partnership.

The result of this part of the case seems to us to be this : that when, by the agreement and understanding of partners, their capital stock and partnership fund consist, in whole or in part, of real estate—inasmuch as it is a well-known rule governing the relation of partnership, that neither partner can have an ultimate and beneficial interest in the capital until the debts are paid and the account settled ; that both rely upon such rule and tacitly claim the benefit of it, and expect to be bound by it ; the same rule shall extend to real estate. The same mutual confidence, which governs the relation in other respects, extends to this ; and, therefore, when real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or tenants in common, it vests in them and their respective heirs, clothed with a trust for the partners, in their partnership capacity, so as to secure the beneficial interest to them until the purposes of the partnership are accomplished. It follows, as a necessary consequence, that such partnership real estate cannot be conveyed away and alienated by one of the partners alone, without a breach of such trust ; and that such a conveyance would not be valid against the other partner, unless made to one who had no notice, actual or constructive, of the trust. But, if a person knows that a particular real estate is

the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals.

But we think the same conclusion is well supported by authorities, although there has been some diversity of opinion amongst the earlier cases.

The adjudged cases were so fully examined by the counsel in their arguments, that it is unnecessary to state them in detail. The principles, which have already been suggested as the grounds on which we decide the present case, were applied in *Phillips v. Phillips*, 1 Mylne & Keen, 649; *Broom v. Broom*, 3 Myle & Keen, 443; *Sigourney v. Munn*, 7 Conn. 11; and *Hoxie v. Carr*, 1 Sumner, 173. In these cases, all the previous decisions on the subject were carefully considered. See, also, 3 Kent Com. (4th ed.) 36-39; 1 Story on Eq., §§ 674, 675; 2 *Ib.*, § 1207; Collyer on Part. 76; Cary on Part., 27, 28; *Houghton v. Houghton*, 11 Simons, 491.

It has been supposed that the case of *Goodwin v. Richardson*, 11 Mass. 469, stands opposed to the decision now made. I do not think it does. That case was decided in 1814, before equity powers existed in this Commonwealth, on the general subject of trusts. It was in terms a question as to the vesting of the real estate; and the Court were bound to decide the case for the defendant, if they found, upon the facts, that the estate in question had vested in the partners, on foreclosure, as tenants in common. Had they decided the other way, they must have decided that partners, taking real estate in satisfaction of a partnership debt, by foreclosing a mortgage, would hold the estate as joint tenants, with right of survivorship at law, without liability to account—a principle directly opposed to the St. of 1785, c. 62, respecting joint tenancy; because in that case and at that time the real estate must descend and vest according to the rules of law, and there was no Court of Equity competent to require the surviving partner to account with the representatives of the deceased party.

In that case, as it happened, both the separate estate and the partnership estate were insolvent, and therefore good justice would have been done, in deciding that the plaintiff should recover for the benefit of the partnership creditors. But the Court were deciding upon a rule of law, which must apply to all cases, and they could not have decided that for the plaintiff without holding that all such estate, held by partners, should be deemed joint estate, with a right of survivorship at law, and without liability to account; a rule opposed to the plainest principles of equity, and to the spirit, if not to the letter, of the statute respecting joint tenancy. The Court were dealing solely with a question of law, in determining a legal estate, and intimate that a Court of Equity might make joint real estate applicable, as personal, to the payment of partnership debts. We consider, therefore, that that decision is not opposed to the decision, upon equitable principles, to which we now propose to come.

On the facts of the present case, we are of opinion that the real estate in question was a part of the capital stock purchased out of the partnership funds, for the partnership use, and for the account of the firm. The partners entered into articles, as distillers. The business required a large building and fixtures, which they purchased and paid for in part out of the joint funds, and gave notes in the partnership name for the remainder of the price, and the estate was regarded by them as partnership effects. The repairs and improvements were also charged to joint account. These are all decisive indications of joint property.

The plaintiff has received a sum in rents and profits that have accrued since his partner's death. The defendant, Clark, as administrator of Burleigh, the deceased partner, has sold an undivided half of the property as his, under a license, and with the assent of the plaintiff. The widow joined to release her dower, for a nominal sum. But we cannot perceive that the right of the widow is distinguishable from that of the creditors and heirs of the deceased partner. As far as this estate was held in trust by her deceased husband, she was not



entitled to dower. For all beyond that, she will be entitled, because he held it as legal estate, unless she is barred by her release; of which we give no opinion.

The plaintiff is entitled to a decree charging the amount of rents and profits in his hands, and so much of the proceeds of the sale made by the administrators as will be sufficient to discharge the balance of the partnership account; and the rest of the proceeds will remain in the hands of Clark, the administrator of Burleigh, to be distributed according to law.

A partnership, as such, cannot take and hold, in its firm name, the legal title to real property: *Tidd v. Rines*, 26 Minn. 201. See, also, *Gille v. Hunt*, 35 Minn. 357; *Morrison v. Mendenhall*, 18 Minn. 232; *German Land Assn. v. Scholler*, 10 Minn. 331; *Menage v. Burke*, 43 Minn. 211; *Howard v. Priest*, 5 Met. 582; *Arnold v. Wainwright*, 6 Minn. 358; *Heirs of Ludlow v. Cooper's Devisee*, 4 Ohio St. 1; *Blake v. Nutter*, 19 Me. 16.



# ILLUSTRATIVE CASES

IN

## REALTY.

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### TITLE TO ESTATES.

“Title is the means whereby the owner of estates hath the just possession of his property.” 2 Bl. Comm. 195.

#### I

#### TENURE.

**Land in America is, as a rule, held allodially.**

MINNEAPOLIS MILL CO. v. TIFFANY.

Supreme Court of Minnesota, 1876.

22 Minn. 463.

CORNELL, J. Section 15, art. 1, of the Constitution declares all lands within this State to be allodial, prohibits feudal tenures of every description, with all their incidents, and makes void all leases and grants of agricultural lands thereafter made for a longer period than twenty-one years, in which shall be reserved any rent or service of any kind. It is quite evident that the framers of the Constitution did not suppose that this declaration as to the allodial character of all lands, and the prohibition of feudal tenures, with their incidents, was sufficiently broad to cover the kind of leases and grants

mentioned in the last clause of this section, without reference to the nature of the lands which might be the subject of the conveyance, else the special inhibition in respect to leases and grants of agricultural lands had been unnecessary; and in this they were clearly right. A reservation, in an allodial grant, of a definite sum, payable annually, for any length of time, whether in the way of rent for the use of the thing granted, or as a consideration for the grant itself, does not give it a feudal character. Fealty was the essential and distinguishing feature of a feudal tenure: *Van Rensselaer v. Hays*, 19 N. Y. 68; *Wallace v. Harmstad*, 44 Pa. St. 492; *White v. Fuller*, 38 Vt. 193.

It is not pretended that the subject of the grant in this instance was agricultural land, and hence the last clause of this constitutional section has no application.

2. The lease under which defendant holds contains the following, among other conditions: "Sec. 11. The grantees are not to use any buildings for, or set up or continue, any laboratory, powder mill, nor any chemical or other works whatever which may be so noxious or dangerous, from fire or otherwise, as to impair, injure, or endanger the life, safety, or reasonable comfort of any person now or hereafter living or employed in and about the land or works of the grantees or their assigns, or which shall endanger the buildings, property, or works now or hereafter placed upon the land of the grantors by themselves or others; and in case *any such* should be so set up, continued, or used, the grantors or their assigns may enter and abate them, etc., and may likewise stop the water from passing into the flumes of the party so setting up, continuing, or using *such nuisance*, until such *nuisance* be removed or discontinued. Nor are the grantors or their assigns to set up, continue, or use *any such* on their land so near that of the grantees as to cause the *above described nuisances, or either of them*. And should any such be set up, etc., the grantees and their assigns may enter and abate them, . . . and may have their action, in case of damage, against the party setting up, using, or continuing *such nuisance*, and if the same should have been

set up, used, or continued, by license from the grantors, the grantees or their assigns shall also be discharged from the payment of rent accruing during the continuance of *such nuisance*."

It seems too clear for argument that the works intended to be prohibited by this section were such, and such only, as may properly be denominated nuisances in a legal sense. That the structure complained of in this instance—a wooden flouring mill, operated by water as a motive power—is a structure of this character is unsupported by any authority, or any legal definition of the word nuisance: *Rhodes v. Dunbar*, 57 Pa. St. 274. As this conclusion is decisive of the case, the other points raised and discussed on the argument need not be considered.

Order affirmed.

Const. Minn., Art. 1, § 15; WILLIAMS, R. P. 6, note; 1 Washburn, R. P. (5th ed.), §§ 69-72; Tiedeman, R. P., § 25; 3 Kent's Comm., § 509.

*and case*  
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**But subject to the right of eminent domain.**

TAYLOR *v.* PORTER.

Supreme Court of New York, 1845.

4 Hill, 140.

BRONSON, J. Every person liable to be assessed for highway labor may apply to the commissioners of highways of the town in which he resides to lay out a road. Whenever application is made to the commissioners for a *private road*, they are to summon twelve freeholders of the town to meet on a day certain, of which notice must be given to the owner or occupant of the land through which it is proposed to lay out the road. The freeholders, when met and sworn, are to view the lands through which the road is applied for, and if they determine that the road is necessary, they are to make and subscribe a certificate in writing to that effect, and the commis-

sioners are required thereupon to lay out the road, and cause a record of it to be made in the town clerk's office. The damages of the owner of the land through which the road is laid, if not adjusted by agreement, are to be assessed by a jury of six freeholders of some other town, and are to be paid *by the person applying for the road*. "Every such private road, when so laid out, *shall be for the use of such applicant, his heirs and assigns*; but not to be converted to any other use or purpose than that of a road. *Nor shall the occupant or owner of the land through which such road shall be laid out be permitted to use the same as a road*, unless he shall have signified his intention of so making use of the same, to the jury or commissioners who ascertained the damages sustained by laying out such road, and before such damages were so ascertained:" 1 R. S. 513, §§ 54, 77-79. The road is paid for and owned by the applicant. The public has no title to nor interest in it. No citizen has a right to use the road as he does the public highway. He can only use it when he has business with the road-owner, or some other lawful occasion for going to the land intended to be benefited by the road. He can only justify an entry on the road, when he could justify an entry on the land on account of which the road was laid out. Even the owner of the land over which the road passes, unless he has given notice of such an intention before the damages are assessed, has no right to use the road for his own purpose; and if he does so, or if his fences encroach upon the road, the owner of the road may have an action against him: *Lambert v. Hoke*, 14 John. 383; *Herrick v. Stover*, 5 Wend. 580. In short, the road is the private property of the applicant. In the words of the statute, the road "shall be for the use of such applicant, his heirs and assigns."

This right of way is an incorporeal hereditament, in which the owner has an estate of inheritance. The owner of the land over which the road is laid has not lost the entire fee, but he has lost the beneficial use and enjoyment of his property forever. It is not, however, material to inquire what *quantum* of interest has passed from him. It is enough that some interest—some portion of his estate, no matter how small—has been taken

from him without his consent. The property of A. is taken, without his permission, and transferred to B. Can such a thing be rightfully done? Has the Legislature any power to say it may be done?

I will not stop to inquire whether the damages 'must not be paid before the title will pass. The difficulty lies deeper than that. Whatever sum may be tendered, or however ample may be the provision for compensation, the question still remains, can the Legislature compel any man to sell his land or his goods, or any interest in them, to his neighbor, when the property is not to be applied to public use? Or, must it be left to the owner to say when, to whom, and upon what terms he will part with his property, or whether he will part with it at all?

The right to take private property for *public* purposes is one of the inherent attributes of sovereignty, and exists in every independent government. Private interests must yield to public necessity. But even this right of eminent domain cannot be exercised without making just compensation to the owner of the property: Const., art. VII, § 6. And thus, what would otherwise be a burden upon a single individual, has been made to fall equally upon every member of the State. But there is no provision in the Constitution that just compensation shall be made to the owner when his property is taken for *private* purposes; and if the power exists to take the property of one man without his consent and transfer it to another, it may be exercised without any reference to the question of compensation. The power of making bargains for individuals has not been delegated to any branch of the government, and if the title of A. can, without his fault, be transferred to B., it may as well be done without as with a consideration. This view of the question is sufficient to put us upon the inquiry, where can the power be found to pass such a law as that under which the defendants attempt to justify their entry upon the plaintiff's land? It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.

Under our form of government the Legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the Legislature to take the property of A. and give it to B., either with or without compensation? Only one clause of the Constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that "the legislative power of this State shall be vested in a Senate and Assembly." It is readily admitted that the two Houses, subject only to the qualified negative of the Governor, possess all "the legislative power of this State;" but the question immediately presents itself, what is that "legislative power," and how far does it extend? Does it reach the life, liberty, or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? In *Wilkinson v. Leland*, 2 Peters, 657, Mr. Justice STORY says: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no Court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." He added: "We know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles,



by every judicial tribunal in which it has been attempted to be enforced." See, also, 2 Kent's Com.13, 340, and cases there cited. The security of life, liberty, and property lies at the foundation of the social compact; and to say that this grant of "legislative power" includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the Legislature with despotic power; and such is the extent of their authority if they can take the property of A., either with or without compensation, and give it to B. "The legislative power of this State" does not reach to such an unwarrantable extent. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power. Such, at least, are my present impressions.

But the question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest. "No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless *by the law of the land*, or the judgment of his peers:" Const., art. VII, § 1. The words "by the law of the land," as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses, "You shall be vested with 'the legislative power of the State;' but no one 'shall be disfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose;" in other words, "You shall not do the wrong, unless you choose to do it." The section was taken with some modifications from a part of the 29th chapter of Magna Charta which provided, that no freeman should be taken, or imprisoned, or be disseised of his freehold, etc., but by lawful

judgment of his peers, or *by the law of the land*. Lord COKE, in his commentary upon this statute, says that these words, "by the law of the land," mean "by the due course and process of law;" which he afterward explains to be "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law." 2 Inst. 45, 50. In North Carolina and Tennessee, where they have copied almost literally this part of the 29th chapter of Magna Charta, the terms "law of the land" have received the same construction: *Hoke v. Henderson*, 4 Dev. 1; *Jones v. Perry*, 10 Yerger, 59; and see 3 Story on Const. U. S. 661; 2 Kent's Com. 13. The meaning of the section then seems to be, that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation.

But if there can be a doubt upon the first section of the seventh article, there can, I think, be none that the seventh section of the same article covers the case. "No person shall be deprived of life, liberty, or property, *without due process of law*; nor shall private property be taken for public use, without just compensation." In the Matter of Albany Street, 11 Wend. 149, where it was held that private property could not be taken for any other than public use, Chief Justice SAVAGE went mainly upon the implication contained in the last member of the clause just cited. He said: "The Constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use, private property shall not be taken from one and applied to the private use of another." And in *Bloodgood v. The Mohawk & Hudson Railroad Co.*, 18 Wend. 59, Mr. Senator TRACY said the words should be construed "as equivalent to a constitutional declaration that private property, without the consent of the owner,

shall be taken *only* for the public use, and then only upon a just compensation." I feel no disposition to question the soundness of these views; but still it seems to me that the case stands stronger upon the first member of the clause: "No person shall be deprived of life, liberty, or property, *without due process of law*." The words "due process of law," in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty, and property; and if the latter can be taken without a forensic trial and judgment there is no security for the others. If the Legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be "due process of law." Perhaps the whole clause should be read together (Matter of John and Cherry Streets, 19 Wend. 659), and then if it do not, as I have supposed, amount to a direct prohibition against taking the property of one and giving it to another, it contains, at the least, an implication too strong to be resisted that such an act cannot be done.

Of course, I shall not be understood as saying that a trial and judgment are necessary in exercising the right of eminent domain. When private property is taken for public use the only restriction is that just compensation shall be made to the owner. But when one man wants the property of another, I mean to say that the Legislature cannot aid him in making the acquisition.

This question is only new with us in its application to private roads. That a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, and, although compensation is made, was adjudged by this Court in the Matter of Albany Street, 11 Wend. 149; and again in the Matter of John and Cherry Streets, 19 Ib. 659. The same doctrine was held by

the Chancellor in *Varick v. Smith*, 5 Paige, 137; and it was admitted by all the members of the Court of Errors who delivered opinions in *Bloodgood v. The Mohawk & Hudson R. R. Co.*, 18 Ib. 9. I might have contented myself with referring to these cases as settling the question; but in so grave a matter as that of declaring an Act of the Legislature unconstitutional and void, I wished very briefly to assign the reasons which had conducted me to that conclusion.

There cannot be a very great number of private roads in the State; and as to most of those which exist, it is probable that the land-owners have in one form or another consented to their use. And when we consider how liberally public roads have already been opened, and how easily they may be obtained when wanted, there cannot be many individuals who will be affected by our decision. But whatever consequences may follow, I am of opinion that a private road cannot be laid out without the consent of the owner of the land over which it passes.

Mills on Eminent Domain, § 1; Lewis on Eminent Domain, §§ 1-5; Boone, R. P., §§ 22, 256; *People v. Salem*, 20 Mich. 481; *Crosby v. Hanover*, 36 N. H. 404; *Kohl v. United States*, 91 U. S. 367.

## 2

**And also subject to the rule, "*Sic utere tuo ut alienum non lædas.*"**

## COMMONWEALTH v. TEWKSBURY.

Supreme Judicial Court of Massachusetts, 1846.

11 Met. 55.

SHAW, C. J. The defendant was indicted for taking and carrying away a quantity of sand and gravel from a beach in the town of Chelsea, contrary to the provisions of St. 1845, c. 117, which are in these words: "Any person who shall take, carry away, or remove, by land or by water, any stones, gravel, or sand from any of the beaches in the town of Chelsea, excepting," etc., "shall, for each offense, forfeit a sum not exceed-

ing \$20, to be recovered, by complaint or indictment, in any Court of competent jurisdiction." The defendant, not denying the taking and carrying away of the gravel, contrary to the terms of the Act, rested his defense on two grounds. 1st. That he was owner of the land in fee, and that the statute did not intend to prohibit the owner from taking gravel from his own land. 2d. That if the statute did so prohibit the owner, for any purpose of public benefit, from taking gravel from his own land, it was a taking of the land for the public use, within the meaning of the Declaration of Rights, art. 10, viz.: that no part of the property of any individual can be taken from him or applied to public uses without making him a reasonable compensation therefor; and inasmuch as the statute made no provision for compensation to the owner, it was unconstitutional and void.

The Judge, before whom the trial was had in the municipal Court, having ruled against the defendant, and the defendant having been convicted, he filed his bill of exceptions, and these questions of law now come before this Court for revision.

The statute, though recent, is a mere revision of a former one, St. 1798, c. 73 (2 Special Laws, 283); they are alike in substance and purpose, and the only change is, in substituting an indictment for a *qui tam* action, as the mode of prosecution. The object of both is apparent, and is a very important one, to protect the harbor of Boston, by preserving the integrity of the beaches, and the natural embankments of sand and gravel by which it is bordered.

1. Does the Act extend the prohibition to the owners of the soil? In terms, it certainly does. "Any person" who does the act is made liable to the penalty. And we can perceive no ground on which an exception can be implied. The obvious purpose of the Legislature was, to prevent the natural embankments from being broken up, and that, by prohibiting the removal of the sand and gravel composing them, by anybody. If done by an owner, the damage would be as great as if done by a stranger.

The argument on this part of the case was this; that if

gravel were taken by a stranger without the consent of the owner, it would be a trespass as to him, and the intent of the Legislature probably was, to declare the private tort a public one, and subject the trespasser to a penalty to the public, in addition to his liability for damages to the owner. But we see nothing in the statute from which to infer such an intent. It is as competent for the Legislature, upon grounds of public policy, to declare an indifferent act injurious to the public, and prohibit it by penalties, as to do the same in respect to an act, which is at the same time tortious as against a private person. We can have no doubt, therefore, that it was the intention of the Legislature to prohibit the owner, as well as all other persons, from breaking up and removing the beaches and gravel banks within the prescribed limits, whether they adopted the proper and constitutional means, and acted within their constitutional powers, in order to accomplish that intent, or not.

2. But the other and far the more important question is, whether such a law is a taking, or appropriation to public use, of the land of all those who own land bordering on the seashore, within the meaning of the Declaration of Rights, and whether it is a law which the Legislature have no constitutional and legitimate authority to make, without providing compensation for such owners.

The Court are of opinion that such a law is not a taking of the property for public use, within the meaning of the Constitution, but is a just and legitimate exercise of the power of the Legislature to regulate and restrain such particular use of property as would be inconsistent with, or injurious to, the rights of the public.

All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community; under the maxim of the common law, *sic utere tuo ut alienum non lœdas*. When the injury is plain and palpable, it may be a nuisance at the common law, to be restrained and punished by indictment. As where one bordering on a navigable river should cut away the embank-

ment on his own land, and divert the water-course so as to render it too shallow for navigation. But there are many cases where the things done in particular places, or under a particular state of facts, would be injurious, when, under a change of circumstances, the same would be quite harmless. As the use of a warehouse for the storage of gunpowder, in a populous neighborhood, or for the storage of noxious merchandise, or the use of buildings for the carrying on of noxious trades, dangerous to the safety, health, or comfort of the community. Whereas, in other situations, there would be no public occasion to restrain any use which the owner might think fit to make of his property. In such cases, we think, it is competent for the Legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public, under particular circumstances, leaving the use of similar property unlimited, where the obvious considerations of public good do not require the restraint. This is undoubtedly a high power, and is to be exercised with the strictest circumspection, and with the most sacred regard to the right of private property, and only in cases amounting to an obvious public exigency. Still, we think, the power exists, and has been long exercised in cases more or less analogous.

The right to restrain owners of land in towns from erecting wooden buildings, except under certain restrictions, has never been doubted, or, if it has been, the doubt has long since been removed. So of the like nature are all laws to regulate and restrain the erection and use of furnaces and steam engines, and buildings designed for carrying on dangerous or noxious trades.

The protection and preservation of beaches, in situations where they form the natural embankments to public ports and harbors and navigable streams, is obviously of great public importance; although on many parts of the coast the situation of the shores is such that the removal of sand and gravel, by the owner, would not be of the least injury to anybody.

The importance of such natural beaches, in a public point of view, may be estimated by the case of Plymouth Beach. The port of that ancient town was protected by a narrow strip

of land extending in front of it. In consequence of cutting away the wood upon it, or from some other cause, it was washed away and broken through by the wind and sea, and the navigation was in danger of being wholly destroyed. Under these circumstances, the public, the government both of the United States and of this Commonwealth, took measures, at great expense, to restore the beach, by artificial means, to its original condition.

The regulation of particular beaches, imposing greater or less restraint upon the use of them by the owners, has been a subject of legislation from early times. Several of these Acts, dating from periods anterior to the revolution, are to be found in the appendix to vol. 3 of the Special Laws. Some of these Acts, and especially those of modern date, and those which prohibit the owner of land from using his herbage, either by mowing or grazing, do provide for a compensation to the owner, for the damage which he may sustain under the restraints of the Act; but many of them do not so provide. It is extremely difficult to lay down any general rule, or draw a precise line between the cases where the restraint of the right of the owner is such that compensation ought to be provided, and where the regulation is such only as to prevent a particular use of the property from being a public nuisance. Without hazarding an opinion upon any other question, we think that a law prohibiting an owner from removing the soil composing a natural embankment to a valuable, navigable stream, port, or harbor, is not such a taking, such an interference with the right and title of the owner, as to give him a constitutional right to compensation, and to render an Act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property, which the Legislature have authority to make.

Exceptions overruled.

*Mears v. Dole*, 135 Mass. 508; *Fletcher v. Rylands*, L. R. 1 Exch. 265-279; *Smith v. Fletcher*, L. R. 7 Exch. 305.

For an excellent explanation of this principle see *Broom's Legal Maxims*, 366, 369, 371.



## II

### HOW ACQUIRED AND LOST.

**There are two modes of acquiring title to land : (1) By descent ; (2) by purchase.**

#### A

#### TITLE BY DESCENT.

**Title to land by descent is that which vests by operation of law in the heir upon the death of his ancestor.**

*Nemo est hæres viventis.*

LOBDELL *v.* HAYES.

Supreme Judicial Court of Massachusetts, 1858.

12 Gray, 236.

THOMAS, J. Upon the decease of the owner of real estate, it descends to and vests in his heirs-at-law, unless otherwise disposed of by his will. It vests in his heirs, however, subject to the payment of his debts. But until a sale is lawfully made for that purpose the heirs may enter upon the estate and receive the rents and profits. Their interest is determined only by the sale: *Gibson v. Farley*, 16 Mass. 287; *Boynton v. Peterborough & Shirley Railroad*, 4 Cush. 467.

This is true also of the estate in which the deceased had an equitable interest, which he had purchased of the city of Boston, upon which he had erected dwelling-houses, and of which he was in possession at the time of his death: Rev. Sts. c. 61, § 1; c. 74, §§ 8-14; *Reed v. Whitney*, 7 Gray, 533.

The real estate of Lobdell was disposed of by his last will and testament. In the portion devised in trust for his daughters, the heirs-at-law, as such, have of course no interest. But, in relation to so much as was devised to the widow, she, as she had a legal right to do, waived the provision of the will. Of

this estate there is no devise over. The devise fails, and the estate descends as intestate estate to the heirs-at-law.

The plaintiff is one of three heirs-at-law who take the estate devised to the widow, and the devise of which fails by her waiver of the provision of the will. The plaintiff would, therefore, be entitled to the possession of one-third of such estate, or of the rents and profits of one-third until the same is sold for the payment of debts; that is to say, she is entitled under the facts agreed to one-third of one-half of the rents received by the administrators, subject to the deductions hereafter stated.

By the agreed statement of facts it appears that the administrators in the collection of the rents and in the management and care of the estates acted as the agents of all the parties in interest. And from the amount to be accounted for as rents are first to be deducted the sums expended for repairs upon the real estate, for interest upon the mortgages, for taxes and insurance, and a reasonable compensation to the administrators for their services in the care of the estates and collection of the rents.

As to the rents received from the houses in Medford Court they must be held to abide the decision in the suit of *Montague v. Lobdell*.

The demand of the widow upon the administrators for dower was of no avail, so far at any rate as it applied to the estates which, by her waiver of the provisions of the will, descended to the heirs-at-law, and no deduction is to be made from the plaintiff's share on that account.

If the parties are unable to agree upon the amount to be paid to the plaintiff, under the rules above stated, the case must be sent to an assessor to fix the amount.

Judgment for the plaintiff.

WILLIAMS, R. P. 443; 3 Washburn, R. P. 6.—578, § 41.

Descent defined: *Donahue's Estate*, 36 Cal. 329.

The heirs take by operation of law, independent of the intention or will of the intestate: *Augustus v. Seabolt*, 3 Met. (Ky.) 161.

Where the same estate is devised that the devisee would have taken by descent, the title passes by descent and not by purchase: *Gilpin v. Hollingsworth*, 3 Md. 190; *Ellis v. Page*, 7 Cush. 163.

But if one devise land to his wife such as she would have taken by law, she takes by purchase and not by descent: *Culbertson v. Duly*, 7 W. & S. 195.

“Heirs” as applied to the living: *Stratford v. Sandford*, 9 Conn. 274.

## B

### TITLE BY PURCHASE.

**Title acquired by purchase includes every title except that by descent, and is of two kinds: (1) That acquired by act at law, either alone or with some precedent act of one party; (2) that acquired by act of parties.**

#### 1

MODES OF ACQUIRING TITLE BY ACT OF LAW, EITHER ALONE  
OR WITH SOME PRECEDENT ACT OF ONE PARTY,  
ARE AS FOLLOWS.

#### a

##### **Escheat.**

**If a citizen die intestate and without inheritable blood, or if an alien purchase land and die, the title to such land vests by escheat, *eo instanti*, in the State, without inquest of office.**

SANDS *v.* LYNHAM.

Court of Appeals, Virginia, 1876.

27 Gratt. 291.

One Haunstein, an alien, died seised of lands in Richmond, Va. He was unmarried and died intestate. After his death, in 1867, one Gleason procured a judgment against his estate, and the lands were sold to satisfy the same to one Sands, who went into possession thereof. Afterward an inquest of office was had, and it was found that Haunstein died intestate and without heirs, and seised at the time of his death of a fee-simple estate in the lands mentioned. The lands were advertised, according to law, to be sold for the benefit of the State, and Sands filed a bill in equity, praying that the officers be enjoined from selling the same. The injunction was granted by the lower Court, but on the hearing it was dissolved, and hence this appeal.

STAPLES, J. The inquisition finds that Solomon Haunstein died seised of an estate of inheritance in the lots in contro-

versy ; that he died intestate and without heirs, and that there is no person known to the jurors to be entitled to the same ; but that said lots have been sold by a decree of the Circuit Court of Henrico County to satisfy an office judgment obtained against the estate of Solomon Haunstein since his death, and that there are now certain parties in possession of said lots claiming under said decree.

It is proper further to state, though it is not part of the inquisition, that the decree referred to was rendered on the 29th April, 1867, in a suit brought, or purporting to have been brought, by William Gleason, assignee of John W. Thompson, against Richard D. Sanxay, curator of the estate of Solomon Haunstein. No copy of the bill or of any exhibit in the record of that suit is filed in this. It does not appear that any order of publication was ever made in the cause, or that there was any party defendant other than Sanxay, the curator. It would seem that the bill and answer were filed on the same day, and on that day the cause was brought on for a hearing by consent, and a decree rendered for a sale of the lots now in controversy.

Upon this state of facts we are to determine what are the rights of the purchasers under that decree. In order to arrive at a satisfactory conclusion upon that point, it becomes necessary to inquire what was the precise status of the real estate of Solomon Haunstein upon his dying intestate and without heirs. Was the title thereto immediately vested in the Commonwealth, or was an inquest necessary to effect that object ?

It is well settled that an alien may take lands by grant. But while he has capacity to take, he has none to hold, and the lands may at once be seized to the use of the State. But until they are so seized the alien has complete dominion over them, and his title cannot be divested except upon office found.

And so if lands are devised to an alien, he acquires a complete, though a defeasible title, by virtue of the devise ; and this title can only be taken away by an inquest of office, which must be perfected by entry or seizure where the possession is not vacant.

In these cases, and there may be others, it seems that the inquisition is necessary to vest a complete and perfect title in the State.

An alien cannot, however, take by descent, because the law will never cast the freehold upon one who is incapable of holding, and as the freehold can never be kept in abeyance for an instant, in such cases it vests immediately in the State without inquest of office.

For the same reason, if an alien dies intestate, or a citizen dies without heritable blood, his lands belong to the State. They vest immediately, without office found. They sink back into their original condition of common property for the general benefit. The rule on this subject is thus laid down by Chancellor KENT in 4 Vol. Com., page 423: "It is a general principle in the American law, and which, I presume, is everywhere declared and asserted, that when the title to land tails from a defect of heirs, it necessarily reverts to the people, as forming the common stock to which the whole community is entitled. Wherever the owner dies intestate, without leaving any inheritable blood, or if the *relatives* he leaves are aliens, there is a failure of competent heirs, and the land vests immediately in the State by operation of law. No inquest of office is necessary in such case."

In *Montgomery v. Dorion*, 7 New Hamp. R. 475, a well-considered case, the following propositions are laid down:

"If an alien purchase lands and die, the lands instantly vest by escheat in the State, without any inquest of office. But while the alien lives, the lands cannot vest in the State without office found.

"In this State (New Hampshire) the lands of which a citizen dies seised without heirs, revert in all cases to the State; provided he dies intestate. Upon principle, it would seem that lands must in such a case vest immediately in the State without any inquest of office, as they do in England in the crown when the king's tenant dies without heirs.

"There might be cases in which an inquest of office might be expedient, as where one person is found in possession,

claiming as heir or otherwise ; but an inquest of office is in no such case essential to vest the title in the State."

In support of these positions numerous other authorities might be quoted ; but a simple reference to the cases is all that is necessary : *Mooers v. White*, 6 John. Ch. R. 360 ; *Jackson v. Beach*, 1 John. Cases, 399 ; *Stevenson and Wife v. Dunlap's Heirs*, 7 Monr. R. 134 ; *Fry v. Tucker*, 2 Dana R. 38 ; *Johnson v. Hart*, 3 John. Cases, 322 ; *Collingwood v. Pace*, 1 Sid. R. 193 ; *Stokes v. Dawes*, 4 Mason R. 268 ; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch R. 663 ; *O'Hanlin v. Den*, 1 Spencer's R. 31 ; *White v. White*, 2 Metc. (Ken.) R. 185 ; *Hinkle's Lessee v. Shadden*, 2 Swan's R. 46.

The case of *Commonwealth v. Hite*, 6 Leigh, 588, is not in conflict with these authorities. That was an information for intrusion on land of the Commonwealth. Being in the nature of an action of trespass *quare clausum fregit*, it will not be maintained except in the case of actual possession. And the chief, if not the only, question was whether the effect of an inquisition of office was to vest the possession in the State. It was held by this Court that when the possession of escheated lands is vacant at the time of office found the effect of that proceeding is at once to vest the State with possession. If the possession is not vacant, it does not become so vested, and an entry or seizure by the State is essential in order to maintain an information for intrusion. This was the sole point decided by the Court. It is very true that some expressions fell from Judge TUCKER to the effect that the crown can only take by matter of record. All of which is strictly accurate as applied to an alien claiming by *grant* or *by devise*. He is in by title, having the freehold, which can only be divested by some act in the nature of a judicial proceeding : Because the king may not enter upon or seize any man's possession upon bare surmises, without the intervention of a jury.

But as, according to the common law, lands cannot be in abeyance or without an owner even for a single minute, it follows necessarily that upon the death of the person last seised,

without heirs capable of inheriting, the title must immediately vest in the State without office found.

The doctrine of escheat is originally derived from the old feudal law. An inquisition does not constitute an escheat. It is simply the means by which the State furnishes authentic record evidence of her title. The word escheat is derived from the French, and properly signifies the falling of the lands by accident to the lord of whom they are holden, in which case the fee is said to be *escheated*. It is a species of reversion by which, upon the death of the tenant without heirs, the lord becomes entitled to the estate. While at common law a writ of escheat was necessary to vest the estate in the lord, when the king became entitled, upon the death of a tenant without heirs capable of inheriting, no office was necessary; but he might enter and seize without judicial proceeding, because in such cases the freehold was cast upon him by law in actual possession.

In this country the doctrine of escheat rests upon the broad principle that when the title to land fails from defect of heirs, or when from any cause there ceases to be an individual proprietor of the land, it reverts back to the community: 1 Lomax's Digest 774, 777; 3 Green's Cruise on Real and Per. Property, 213. In such cases, the title being in the State upon the death of the owner, no inquest of office is necessary.

If the possession be vacant at the death of the owner, both title and possession are at once transferred to the State. If, on the contrary, the land be held by adversary possession, the State must enter by her officers. Such an entry may perhaps be necessary to enable the State to make a valid grant of the land, or to maintain an information for intrusion; but it is not essential to the title, any farther than possession is to be considered an element of title.

The State, of course, takes the lands subject to any liens created by the owner, and also to any valid debts contracted by him. But so does the heir, if there is one. This title is none the less complete, because perchance the land may be taken to satisfy the claims of creditors.

In the case before us, upon the death of Solomon Haunstein intestate, without heirs, his real estate became vested *eo instanti* in the State; the possession being vacant, was also transferred along with the title. Whoever entered into the possession did so in subordination to her title. When therefore the jury of inquest found that certain persons were in possession of the lots at the time of the inquisition, which was more than two years after the death of the owner, they found an immaterial fact, which did not affect the title previously acquired by the State.

It seems, however, that the appellant was one of the persons in possession, claiming title to the property under the decree of the Circuit Court of Henrico County. And it is insisted that this decree, having been rendered by a Court of competent jurisdiction, is conclusive of every question decided by it: until reversed by some proper proceeding instituted in the Court which pronounced it.

No one will maintain that the decision of a Court, having jurisdiction of the subject-matter in a case before it, can be collaterally drawn in question for any errors therein, or in the proceedings which led thereto. But it is equally beyond controversy that a decree, however regular in its forms, only binds parties and privies: it cannot affect the title of a person not before the Court. The exceptions to this rule are very few, and have nothing to do with the matter in controversy. It may be that a purchaser at a judicial sale is not affected by errors in the proceedings which led to the decree. He certainly is affected by a want of proper parties before the Court. In this State he takes all the risks of the title. He is bound at his peril to see to it that the persons having title to the property are parties to the suit. Without this, no act of the Court can give him a valid title. The curator of Solomon Haunstein's estate was the only party defendant to the suit in which the decree of sale was rendered. He had nothing to do with the real estate; not the shadow of a title to or interest in it. If the appellant acquired title by his purchase, whose title did he acquire? Certainly not Solomon Haunstein's, as



all his interest terminated with his death ; not that of any heirs, as there were none in existence. The title of the State ? It is not pretended. Her rights could not be affected by any orders or decrees in a suit to which she was not a party. If authority were needed to sustain so plain a proposition, it may be found in the case of *Hudgin v. Hudgin's Ex'or et als.*, 6 Gratt. 320. The decision of this Court in that case is conclusive upon this branch of the present case.

It is very questionable, to say the least, whether the general statutes making real estate assets for the payment of debts, and authorizing suits in equity for the sale and administration of the same, apply to escheated lands. The design of those statutes was to give to creditors a remedy against heirs and devisees in the event of a deficiency of personal estate ; and all the provisions have reference to lands which have been devised by will or have descended upon heirs in cases of intestacy.

In cases of escheated lands, the 27th section of chapter 113, Code of 1860, prescribes the mode by which the creditor may enforce his demand against the realty where there is no personalty. It is very true that this section only provides for those cases in which there has been an actual inquest of office. It has been argued that the creditor may be delayed for years, if he is compelled to await an inquisition before instituting proceedings to enforce his demand. It will be seen, however, upon an examination of the various provisions in regard to escheats that but little difficulty is likely to occur in this respect. Each commissioner of the revenue is required annually to furnish a list of lands in his district of which any person shall have died seised of an estate of inheritance, intestate and without any known heir. On receiving such list, or upon information from any person in writing and under oath, the escheator is required at once to hold inquest to determine whether the lands have escheated to the Commonwealth : Code of 1860, chapter 113, §§ 3 and 4. These provisions afford to the creditor the fullest means of enforcing prompt action on the part of the State in the assertion of his claim ; while the 27th section gives to him adequate remedies

for the recovery of his demand. Any small delay that may occur by this course bears no sort of comparison to the mischiefs which will result from the establishment of a contrary doctrine. To hold that upon the death of a person without known heirs, any one claiming to be a creditor may file a bill in equity, with a personal representative perhaps in the interest of the plaintiff as the only defendant, and obtain a decree for the sale of the real estate, and thus divest the title of the Commonwealth, is to open the door to the perpetration of the grossest frauds and injustice. The claim may be wholly fictitious. The sale of the lands may be altogether unnecessary. And even if necessary, they may be sold at the most ruinous sacrifice. Who is to protect the interests of the State against abuses and frauds of this description? It is impossible to foresee the mischiefs that will ensue if this Court shall establish a rule of this sort.

This identical question has been the subject of adjudication in other States. In every case I have seen it has been held that upon the death of the owner of lands intestate, without heirs capable of inheriting, the title, *eo instanti* and before office found, vests in the State; and the title could not be divested by a sale made under the decree of any Court, unless the State in some form is a party to the proceeding: *Hinkle's Lessee v. Shadden*, 2 Swan's R. 46; *O'Hanlin v. Den*, 1 Spenc. R. 31-43; 1 *Zabriskie* R. 582.

If these views be correct, the appellant acquired no title by his purchase valid as against the State. As the title of the latter does not depend upon the inquisition, the alleged errors and irregularities in the proceedings of the escheator are not of the slightest consequence. The rights of the State are not affected by them. The appellant can derive no advantage from them.

The decree of the Circuit Court of the city of Richmond entered on the 17th day of June, 1869, enjoining the sale of the lots in controversy, was therefore manifestly erroneous upon its face. It was erroneous not only for the reasons stated, but for the further reason that it was rendered without

an answer for the escheator. The provisions of the 8th section are positive, that the escheator shall file an answer stating the objection to the claim; and the cause shall be heard without any unnecessary delay, upon the petition, answer, and the evidence. It was the duty of the Court to require such an answer before adjudicating the rights of the State. The decree of the Circuit Court was a decree by default; and the bill of review subsequently filed by the escheator may be treated as a petition for a rehearing. Such an application is required in all cases of decrees by default before an appeal is taken. But even if it be treated as a bill of review, it was a proper case for such a bill for the reasons already stated.

The decree of the 16th of June, 1874, is, however, erroneous in one respect. If the appellant was a purchaser in good faith, he had the right to be substituted to all rights and remedies of the creditor whose debt was paid by the proceeds of sale of the lots in controversy. This was the course pursued by this Court in the case of *Hudgin v. Hudgin's Ex'or*, 6 Gratt. 320, already referred to. This Court having decided in that case that the devisees were not bound by the decree for the sale of their lands in their absence, was of opinion that the purchaser having bought in good faith, and the claim of the creditor being a just one, the former was entitled, upon a disaffirmance of the sale, to be substituted to the rights of the creditor, and to charge the land with the amount of the debt paid by him.

This, of course, involves an inquiry into the validity of the claim asserted by William Gleason, as assignee of John W. Thompson. It may be, as is alleged, that this claim was utterly fraudulent. This record does not furnish any reliable or satisfactory information on that subject. This Court cannot undertake to affirm positively that it is a fictitious claim. If such be its character, neither the State nor the lands of which Haunstein died possessed can be made chargeable with it. It will devolve upon the appellant to show that the debt is a just one; and that must be done by evidence other than the judgment in question. This evidence he may be

able to furnish. At all events, he should have an opportunity of doing so, if desired by him. The decree is therefore affirmed dissolving the injunction, but the same to be retained in the Circuit Court for the inquiry, if desired by the appellant.

The decree was as follows :

The Court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of the Circuit Court dissolving the appellant's injunction. It is therefore adjudged, ordered, and decreed that said decree be affirmed, and that the appellant pay to the appellee his costs by him expended in the prosecution of his appeal here.

The Court is further of opinion that the appellant, upon showing that he was a *bona fide* purchaser of the lots in controversy, and the claim asserted by William Gleason, assignee of John W. Thompson, is a valid debt, justly chargeable upon the estate of Solomon Haunstein, deceased, would be justly entitled to be substituted to all the rights and remedies of said Gleason against said estate. The cause is therefore remanded to the said Circuit Court, with instructions to retain the same a reasonable time in that Court, to afford the appellant an opportunity, if desired by him, of establishing the facts upon which his right of substitution depends.

WILLIAMS, R. P. 125; 2 Bl. Comm. 244; Crane *v.* Reeder, 21 Mich. 24-77; Ellis *v.* State, 3 Tex. Civ. App. 170; 21 S. W. Rep. 66; Hanna *v.* State; 84 Tex. 664; Bent *v.* St. Vrain, 30 Mo. 268.

Office Found—Practice Therein : Wallahan *v.* Ingersoll, 117 Ill. 123; Gen. Stats. Minn. 1889, ch. 46, § 64.

"A monster which hath not the shape of mankind," and bastards, as well as aliens, have no inheritable blood : 2 Bl. Comm. 246.

**The State only can enforce an escheat.**AMERICAN MORTGAGE CO. *v.* TENNILLE.

Supreme Court of Georgia, 1891.

87 Ga. 28.

LUMPKIN, J. Tennille executed and delivered to J. K. O. Sherwood a promissory note, and at the same time, in order to secure the same, made and delivered to said Sherwood a deed to certain land. Sherwood transferred the note and conveyed the land to the American Mortgage Company of Scotland, Limited, who sued the note to judgment in the Superior Court of Quitman County, and an execution issued thereon was levied upon the land described in the aforesaid deed, the mortgage company having previously filed in the clerk's office a deed purporting to reconvey the land to said Tennille for the purpose of making this levy. To the levy of the execution Tennille filed his affidavit of illegality, containing several grounds, one of which was as follows, viz.: that "the said plaintiff was a foreign corporation, has never been incorporated by the laws of Georgia, and owned more than five thousand acres of land in said State (so far as to claim the same and hold deeds thereto), in conflict with and against the laws of said State, and therefore could not hold the title to lands or convey the same to the defendant legally." The defendant served on the plaintiff a notice to produce at the trial a number of papers, and among them, the charter of the plaintiff and deeds from fourteen persons to Sherwood, and from Sherwood to the plaintiff, covering various lands in Randolph and Quitman Counties; the use intended to be made of said deeds being to prove the ground of illegality above quoted. The Court held that said charter and these deeds should be produced, and upon the plaintiff's failure to do so, ordered the levy of the execution to be dismissed. We can see no error in requiring the production of the charter, as it might contain evidence supporting one of the grounds of the illegality. The main question, therefore, upon which this Court is asked to

pass, in this case, is whether or not the ground of illegality setting forth plaintiff's inability to hold land in excess of five thousand acres is good in law, and consequently whether or not the plaintiff should have been required to produce said deeds.

1. It seems to be well settled that, in a case of this kind, the State alone is authorized to assert her policy in prohibiting foreign corporations from holding five thousand or more acres of land in Georgia, and that individuals have no right to make the question in controversies with each other. Numerous decisions may be found to the effect that, where a corporation acquires or uses land to any extent, or for any purpose, not authorized by its charter, the question of its right so to do cannot be made by an individual in a legal controversy with the corporation, or with those claiming under it, but must be raised directly by a proceeding instituted for that purpose by the State wherein such corporation is exercising such powers *ultra vires*. Some of these decisions were made by the Courts of the State in which the corporations themselves were created, and others in States outside of which the corporations involved had been chartered. None of them are directly in point as to the precise question made in the case now before us, because the disability of the corporations arose under the provisions of their own charters. They are referred to merely to show the trend of judicial opinion on this question. These cases are so numerous and the doctrine they establish is so well recognized, we deem it unnecessary to cite them by name. The following language, used by Judge DILLON in his great work on Municipal Corporations, has some bearing on the question now being considered: "Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding instituted at the *instance of the State*. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation, in purchasing, exceeds its power is a question

between it and the State, and does not concern the vendor or others:" 2 Dillon on Mun. Corp. (ed. 1890), § 574. We have been able to find some cases directly in point. In that of *Barnes v. Suddard*, 7 N. E. Rep. 477, it was held that, where a foreign corporation had power to acquire real estate so far as necessary for its business, its acquisition of realty cannot be assailed in a collateral proceeding as an act *ultra vires*. It appears from an examination of that case, that in Illinois foreign corporations had the same rights to own and hold real estate as did domestic corporations of that State, and the case turned, not upon the charter powers of the corporation, but upon its right under the Illinois law to hold land. The Pennsylvania Act, approved April 26, 1855, forbade any foreign corporation to acquire and hold real estate. Notwithstanding this statute, it was held, in the case of *Hickory Farm Oil Co. v. B., N. Y. & P. R. R. Co.*, 32 Fed. Rep. 22, that a deed of conveyance of land to such a corporation was not void, but passed the title, and that the corporation held the land subject to the Commonwealth's right of escheat; also that the Commonwealth alone could object to the legal capacity of the corporation to hold real estate. In support of this opinion, *Bone v. Canal Co.*, 5 Atl. Rep. 751, and *R. R. Co. v. Lewis*, 4 N. W. Rep. 842, are cited. Another case holding the same way is that of *Carlow v. Aultman & Co.*, decided by the Supreme Court of Nebraska, and reported in 44 N. W. Rep. 873. An Act of Nebraska passed in 1887, provided that no non-resident alien foreigner, nor any corporation not incorporated by the laws of that State, should acquire or own, hold or possess any real estate in the State of Nebraska. While this law was in force, *Aultman & Co.*, a foreign corporation, purchased land in that State at a judicial sale, and it was held that this corporation's title was valid against every one but the State, and could be divested only by proceedings brought by the State for that purpose. These foreign corporations, it seems, have been treated as aliens were in England as to purchasing and holding real estate. By the common law, while an alien might purchase, he could do so only for the benefit of the king, and the king

was entitled to land purchased by him by virtue of his prerogative upon "office found," and accordingly it was held that, unless the proceeding of "office found" was perfected, an alien had the power to hold and convey the land *inter vivos*: 1 Devlin on Deeds, §§ 124, 125. It therefore seems clear, in view of the cases cited and the common-law foundation upon which the principle governing them is based, that the doctrine is thoroughly established in our American States, that the right of foreign corporations to purchase or hold lands in excess of the authority conferred either by their own charters or by the laws of the State in which such purchase is made, can only be questioned by the State itself in which such land may be situated. It follows, of course, that the defendant in this case had no right whatever to raise the question made in the ground of this illegality hereinbefore set forth. And that being true, the production of the deeds called for was unnecessary and useless, because the ground of illegality in support of which it was sought to introduce these deeds presented no legal reason for interfering with the progress of the plaintiff's execution.

2. Another ground of the illegality alleged in effect that the deed purporting to be from the plaintiff to the defendant in execution, which had been filed in the clerk's office, was no sufficient deed, and would not convey title out of the plaintiff to the defendant, but would only throw a cloud upon the defendant's title and cause the land to sell for less than its true value. If these assertions are true, they amount to a good ground of illegality. It may be that such ground is not set forth with sufficient clearness, but as there was no special demurrer or objection to it because it was wanting in distinctness or fullness, but only a general motion, in the nature of a demurrer, to dismiss the affidavit of illegality, the point was not rightly made to the Court below as to the insufficiency of this ground, and the Judge therefore properly refused to dismiss the affidavit of illegality as a whole. If this ground failed to set forth the reasons why the deed referred to was insufficient and failed to convey title to the defendant, this distinct ob-



jection should have been made to it. We therefore leave the case to be tried again in the Court below, with such additional light shed upon the law of the case as may be gathered from this opinion.

Judgment reversed.

See above case in 12 L. R. A. 529, full note.

*Escheat* was to the lord of whom the lands were held. *Forfeiture* in case of high treason was to the crown. But in case of an escheat, if there were no lord of the fee, the interest would go to the crown: WILLIAMS, R. P. 126.

Occupancy.—Title by occupancy as technically known is now obsolete: Gen. Stats. (Minn.) 1878, ch. 45, § 6; Gen. Laws (Minn.) 1889, p. 105, § 62.

## b

### Title by prescription or adverse possession.

At common law title to incorporeal hereditaments only could be acquired by prescription, but by virtue of the statute of limitations the title to land may now be acquired in a similar manner, usually called adverse possession.

*As against a stranger mere possession of land is title.*

SHERIN v. BRACKETT.

Supreme Court of Minnesota, 1886.

36 Minn. 152.

BERRY, J. This is an action in the nature of ejectment, in which the plaintiffs, seeking to recover possession of a strip of land, alleged that on October 1, 1885, and long before, they were and now are owners thereof; and further that they and their ancestors, from whom they derive title, have been in the actual, peaceable, open, notorious, adverse, and continuous possession thereof for more than twenty-five years prior and up to October 8, 1885; that on that day, while they were in such actual possession, defendant unlawfully entered upon said strip of land and wrongfully ejected them therefrom, and ever since wrongfully detains possession thereof.

Doubtless the intent of the pleader was to set up title in fee based upon what is called adverse possession. But as the

greater includes the less, the complaint sufficiently pleaded actual possession at the time of the defendant's alleged entry, so that if upon the trial the plaintiffs failed to make out adverse possession, such as would give them title as against the holder of the paper title, still, if they proved actual possession, they might properly insist that they were within the allegations of their complaint, and had made out a case as against a mere trespasser. For as against one showing no title in himself, possession is title: *Wilder v. City of St. Paul*, 12 Minn. 116 (192); *Rau v. Minnesota Valley R. R. Co.*, 13 Minn. 407 (442); *Sedg. & W. Tr. Title Land*, §§ 717, 718.

The evidence upon the trial below in the case at bar showed that plaintiffs were in possession of the strip of land in controversy at the time of defendant's entry upon it, and defendant gave no evidence of any right or title in himself. In this state of the evidence the plaintiffs were entitled to judgment, and hence the trial Court erred in dismissing the action at the close of the plaintiffs' testimony. As this point is insisted upon by the plaintiffs it cannot be disregarded, and so there must be a new trial.

This disposes of the present appeal, but (as we surmise) not of the real merits of the controversy, and therefore, with reference to a new trial, we deem it expedient to determine certain other questions raised upon the argument.

And, *first*, though there are a few cases which hold that the statutory period of adverse possession, which will bar an action for the recovery of land, may be made up by tacking together the periods of the adverse possession of several successive holders between whom there is no privity (see *Scales v. Cockrill*, 3 Head, 432; *Smith v. Chapin*, 31 Conn. 530; *Davis v. McArthur*, 78 N. C. 357), the rule laid down by the great majority of Courts and by the text-writers, and supported by the weight of authority, and which must be regarded as the true rule, is that privity between successive adverse holders is indispensable. And this upon the principle that unless the successive adverse possessions are connected by privity, the disseisin of the real owner resulting from the adverse possession

is interrupted, and during the interruption, though but for a moment, the title of the real owner draws to it the seisin or possession: *Melvin v. Proprietors, etc.*, 5 Metc. 15 (38 Am. Dec. 384); *Haynes v. Boardman*, 119 Mass. 414; *McEntire v. Brown*, 28 Ind. 347; *Jackson v. Leonard*, 9 Cow. 653; *Wood, Lim.*, § 271; *San Francisco v. Fulde*, 37 Cal. 349; *Crispen v. Hannavan*, 50 Mo. 536; *Shuffleton v. Nelson*, 2 Sawy. 540; *Ang. Lim.*, §§ 413, 414; *Sedg. & W. Tr. Title Land*, §§ 740, 745-747; *Riggs v. Fuller*, 54 Ala. 141.

*Second.* The privity spoken of exists between two successive holders when the later takes *under* the earlier, as by descent (for instance, a widow under her husband, or a child under its parent), or by will or grant, or by a voluntary transfer of possession: *Leonard v. Leonard*, 7 Allen, 227; *Hamilton v. Wright*, 30 Iowa, 480; *Jackson v. Moore*, 13 John. 513 (7 Am. Dec. 398); *McEntire v. Brown*, *supra*; *Weber v. Anderson*, 73 Ill. 439; *Wood, Lim.*, § 271; *Sedg. & W. Tr. Title Land*, §§ 747, 748.

*Third.* While to operate as a bar, adverse possession must be continuous, continuity will not be interrupted by the possession, during any part of its period, of one who occupies the premises as a tenant of the alleged adverse possessor. In such cases the tenant's possession is that of his landlord: *San Francisco v. Fulde*, *supra*; *Rayner v. Lee*, 20 Mich. 384; *Sedg. & W. Tr. Title Land*, § 747.

*Fourth.* Possession, to be adverse, so as to bar an owner's right of action, must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely: *Sedg. & W. Tr. Title Land*, § 731 *et seq.*

This is all which we deem it necessary to say in this case; for, as there is to be a new trial, we forbear to comment upon the evidence.

Order reversed, and new trial awarded.

But to acquire title to land as against the real owner, there must be an entry thereon by the claimant, with intent to claim title thereto, followed by an actual, open, continuous, exclusive, and hostile possession during the statutory period of limitation.

*Actual Entry with Hostile Intent.*

EWING v. BURNET.

Supreme Court of the United States, 1837.

11 Pet. 41.

Mr. Justice BALDWIN. In the Court below, this was an action brought in November, 1824, by the lessor of the plaintiff, to recover possession of lot No. 209, in the city of Cincinnati, the legal title to which is admitted to have been in John Cleves Symmes, under whom both parties claimed: the plaintiff, by a deed dated 11th of June, 1798, to Samuel Foreman, who, on the next day, conveyed to Samuel Williams, whose right, after his death, became vested in the plaintiff: the defendant claimed by a deed to himself, dated 21st of May, 1803, and an adverse possession of twenty-one years before the bringing of the suit. It was in evidence that the lot in controversy is situated on the corner of Third and Vine Streets; fronting on the former one hundred and ninety-eight, on the latter ninety-eight feet; the part on Third Street is level for a short distance, but descends toward the south along a steep bank, from forty to fifty feet, to its south line; the side of it was washed in gullies, over and around which the people of the place passed and repassed at pleasure. The bed of the lot was principally sand and gravel, with but little loam or soil; the lot was not fenced, nor had any building or improvement been erected or made upon it, until within a few years before suit brought; a fence could have been kept up on the level ground on top of the hill on Third Street, but not on its declivity, on account of the deep gullies washed in the bank; and its principal use and value was in the convenience of digging sand and gravel for the inhabitants. Third Street separated this lot from the one on which the defendant resided from 1804, for many years, his

mansion fronting on the street ; he paid the taxes on this lot from 1810 until 1834, inclusive ; and from the date of the deed from Symmes, until the trial, claimed it as his own. During this time, he also claimed the exclusive right of digging and removing sand and gravel from the lot ; giving permission to some, refusing it to others ; he brought actions of trespass against those who had done it, and at different times made leases to different persons, for the purpose of taking sand and gravel therefrom, besides taking it for his own use, as he pleased. This had been done by others without his permission, but there was no evidence of his acquiescence in the claim of any person to take or remove the sand or gravel, or that he had ever intermitted his claim to the exclusive right of doing so ; on the contrary, several witnesses testified to his continued assertion of right to the lot ; their knowledge of his exclusive claim, and their ignorance of any adverse claim for more than twenty-one years before the present suit was brought. They further stated, as their conclusion from these facts, that the defendant had, from 1806, or 7, in the words of one witness, “ had possession of the lot ;” of another, that since 1804, “ he was as perfectly and exclusively in possession, as any person could possibly be of a lot not built on or inclosed ;” and of a third, “ that since 1811, he had always been in the most rigid possession of the lot in dispute ; a similar possession to other possessions on the hill lot.” It was further in evidence that Samuel Williams, under whom the plaintiff claimed, lived in Cincinnati, from 1803, till his death in 1824 ; was informed of defendant having obtained a deed from Symmes, in 1803, soon after it was obtained, and knew of his claim to the lot ; but there was no evidence that he ever made an entry upon it, demanded possession, or exercised or assumed any exercise of ownership over it ; though he declared to one witness, produced by plaintiff, that the lot was his, and he intended to claim and prove it when he was able. This declaration was repeated often ; from 1803, till the time of his death, and on his death-bed ; and it appeared that he was, during all this time, very poor ; it also appeared in evidence, by the plaintiff’s

witness, that the defendant was informed that Williams owned the lot before the deed from Symmes, in 1803, and after he had made the purchase.

This is the substance of the evidence given at the trial, and returned with the record and a bill of exceptions, stating that it contains all the evidence offered in the cause: whereupon the plaintiff's counsel moved the Court to instruct the jury that on this evidence the plaintiff was entitled to a verdict; also that the evidence offered by the plaintiff and defendant was not sufficient, in law, to establish an adverse possession by the defendant: which motions the Court overruled. This forms the first ground of exception by the plaintiff to the overruling his motions: 1. The refusal of the Court to instruct the jury that he was entitled to recover: 2. That the defendant had made out an adverse possession.

Before the Court could have granted the first motion, they must have been satisfied that there was nothing in evidence, or any fact which the jury could lawfully infer therefrom, which could in any way prevent the plaintiff's recovery; if there was any evidence which conduced to prove any fact that could produce such effect, the Court must assume such fact to have been proved; for it is the exclusive province of the jury to decide what facts are proved by competent evidence. It was also their province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the Court could not interfere, the plaintiff's right to the instructions asked must depend upon the opinion of the Court, on a finding by the jury in favor of the defendant, on every matter which the evidence conduced to prove; giving full credence to the witnesses produced by him, and discrediting the witness for the plaintiff.

Now as the jury might have refused credence to the only witness who testified to the notice given to the defendant of Williams' ownership of the lot in 1803, and of his subsequent assertion of claim, and his intention to improve it; the testimony of this witness must be thrown out of the case, in testing the

correctness of the Court in overruling this motion ; otherwise we should hold the Court below to have erred, in not instructing the jury on a matter exclusively for their consideration ; the credibility of a witness, or how far his evidence tended to prove a fact, if they deemed him credible. This view of the case, throws the plaintiff back to his deed, as the only evidence of title, on the legal effect of which, the Court were bound to instruct the jury as a matter of law, which is the only question to be considered on this exception.

It is clear that the plaintiff had the elder legal title to the lot in dispute, and that it gave him a right of possession, as well as the legal seisin and possession thereof, co-extensively with his right ; which continued till he was ousted by an actual adverse possession : 6 Pet. 743 ; or his right of possession had been in some other way barred. It cannot be doubted that from the evidence adduced by the defendant, it was competent for the jury to infer these facts ; that he had claimed this lot under color and claim of title, from 1804, till 1834 ; had exercised acts of ownership on, and over it, during this whole period ; that his claim was known to Williams and to the plaintiff ; was visible ; of public notoriety for twenty years previous to the death of Williams. And if the jury did not credit the plaintiff's witness, they might also find that the defendant had no actual notice of Williams' claim ; that it was unknown to the inhabitants of the place, while that of the defendants was known ; and that Williams never did claim the lot, or assert a right to it from 1803, till his death in 1824. The jury might also draw the same conclusion from these facts, as the witnesses did ; that the defendant was during the whole time in possession of the lot, as strictly, perfectly, and exclusively, as any person could be of a lot not inclosed or built upon ; or as the situation of the lot would admit of. The plaintiff must therefore rely on a deed of which he had given no notice, and in opposition to all the evidence of the defendant, and every fact which a jury could find, that would show a right of possession in him, either by the presumption of a release or conveyance of the elder legal title, or by an adverse

possession. On the evidence in the cause the jury might have presumed a release, a conveyance, or abandonment of the claim or right of Williams, under a deed in virtue of which he had made no assertion of right from 1798, in favor of a possession, such as the defendant held from 1804; though it may not have been strictly such an adverse possession, as would have been a legal bar under the act of limitations. There may be circumstances which would justify such a presumption in less than twenty-one years: 6 Pet. 513; and we think that the evidence in this case was in law sufficient to authorize the jury to have made the presumption to protect a possession of the nature testified for thirty years; and if the jury could so presume, there is no error in overruling the first motion of the plaintiff.

On the next motion, the only question presented is on the legal sufficiency of the evidence to make out an ouster of the legal seisin and possession of Williams by the defendant, and a continued adverse possession for twenty-one years before suit brought.

An entry by one man on the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim and color of right, it is an ouster; otherwise it is a mere trespass, in legal language the intention guides the entry, and fixes its character. That the evidence in this case justified the jury in finding an entry by the defendant on this lot, as early as 1804, cannot be doubted; nor that he claimed the exclusive right to it under color of title, from that time until suit brought. There was abundant evidence of the intention with which the first entry was made, as well as of the subsequent acts related by the witnesses, to justify a finding that they were in assertion of a right in himself; so that the only inquiry is as to the nature of the possession kept up. It is well settled that to constitute an adverse possession, there need not be a fence, building, or other improvement made: 10 Pet. 442; it suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises in controversy, for twenty-one years, after an



entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said that where acts of ownership have been done upon land, which from their nature indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant without interruption, or an adverse entry by him, for twenty-one years, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him; if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation, or residence are necessary to constitute actual possession: 6 Pet. 513; when the property is so situated as not to admit of any permanent useful improvement; and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. Whether this was the situation of the lot in question, or such was the nature of the acts done, was the peculiar province of the jury; the evidence in our opinion was legally sufficient to draw the inference that such were the facts of the case; and if found specially, would have entitled the defendant to the judgment of the Court in his favor; they, of course, did not err in refusing to instruct the jury that the evidence was not sufficient to make out an adverse possession.

The remaining exceptions are to the charge of the Court, in which we can perceive no departure from established principles. The learned Judge was very explicit in stating the requisites of an adverse possession; the plaintiff had no cause of complaint of a charge, stating that exclusive appropriation by an actual occupancy, notice to the public, and all concerned of the claim, and enjoyment of profits by defendant, were all necessary. No adjudication of this Court has established stricter rules than these; and if any doubts could arise, as to

their entire correctness, it would be on an exception by the defendant. In applying them in the subsequent part of the charge to the evidence, there seems to have been no relaxation of these rules. The case put by the Court, as one of adverse possession, is of a valuable sand bank exclusively possessed, and used by the defendant, for his own benefit, by using and selling the sand; and this occupancy, notorious to the public and all concerned, which fully meets all the requisites before stated, to constitute adverse possession. If we take the residue of the charge literally, it would seem to add other requisites; as the payment of taxes, ejecting and prosecuting trespassers on the lot; its contiguity to the defendant's residence, etc.; but such is not the fair construction of the charge, or the apparent meaning of the Court. These circumstances would seem to have been alluded to, to show the intention with which the acts previously referred to were done; in which view they were important, especially, the uninterrupted payment of taxes on the lot for twenty-four successive years; which is a powerful evidence of claim of right to the whole lot. The plaintiff's counsel has considered these circumstances as making a distinct case in the opinion of the Court, for the operation of the statute; and has referred to the punctuation of the sentence, in support of this view of the charge. Its obvious meaning is, however, to state these as matters additional or cumulative to the preceding facts; not as another distinct case made out by the evidence, on which alone the jury could find an adverse possession. Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.

It has been urged, in argument, that as the defendant had notice of the claim of Williams, his possession was not fair and honest, and so not protected by the statute. This admits of two answers: 1. The jury was authorized to negative any notice; 2. Though there was such notice of a prior deed, as

would make a subsequent one inoperative to pass any title, yet an adverse possession for twenty-one years, under claim and color of title, merely void, is a bar; the statutory protection being necessary only where the defendant has no other title but possession, during the period prescribed.

The judgment of the Circuit Court is therefore affirmed.

*Ellicott v. Pearl*, 10 Pet. 441; *Kerr v. Hitt*, 75 Ill. 51; *Clark v. Potter*, 32 Ohio St. 49; *Fleming v. Maddox*, 30 Iowa, 241; *Churchill v. Onderdonk*, 59 N. Y. 136; *Dean v. Goddard*, 56 N. W. Rep. 1060.

### *Actual Possession.*

#### FLEMING *v.* MADDOX.

Supreme Court of Iowa, 1870.

30 Iowa, 239.

MILLER, J. The only error assigned is the ruling of the Circuit Court, sustaining appellee's motion to set aside the sheriff's sale and deed. The facts disclosed by the record are:

1. The appellees, Thomas A. Maddox and his wife, at the time of the issuance of the execution, levy, and sale resided in Polk County.

2. The land levied on and sold is situated in Boone County.

3. Thomas A. Maddox was the owner of the land levied on, upon which he had erected a saw-mill which he had been operating up to within four or five weeks of the levy, manufacturing the timber on the premises into lumber; at the time of the levy, however, the mill, for some temporary reason, was not running. There were a number of lumbermen and choppers, employees of defendant, residing and working on the land at the time of the levy, one of whom had the general management of defendant's business connected with the mill, etc.

4. Neither the defendant, nor his wife, nor his foreman on the premises were served with written notice of the levy and sale of the land, as contemplated by section 3318 of the

Revision in cases where a defendant in execution is in the actual occupation and possession of the land levied on.

5. The execution was a special one issued upon a judgment and decree of foreclosure of a mortgage against the land levied and sold.

Upon these facts the Court below held that the defendant, Thomas A. Maddox, was entitled to the notice prescribed in the section of the Revision above named. Was there error in this ruling? The provisions of the section referred to are: "If the defendant is in the *actual occupation and possession* of any part of the land levied on, the officer having the execution shall, at least twenty days previous to such sale, serve the defendant with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale; and *sales made without the notice* required in this section *may be set aside on motion* made at the same or the next term thereafter."

There are two kinds of possession of real property known to the law—*actual* and *constructive*. It is actual when in the immediate occupancy of the party. It is actual where the owner goes upon the land to take possession, and exercises acts of ownership over it. It is actual also where one having the title is in possession of lands by his tenant, agent, or steward: 2 Bouv. Law Dic. 352, title "Possession;" Langworthy v. Myers *et al.*, 4 Iowa, 21, 39, 40; Wall v. Nelson, 3 Litt. 398; Humphrey v. Jones, 3 Mon. 261; Bell v. Longworth, 6 Ind. 274; Speed v. Buford, 3 Bibb. 75.

Constructive possession is where one claims to hold by virtue of some title, without having the actual occupancy, as when the owner of a tract of land, regularly laid out, is in possession of a part, he is constructively in possession of the whole: 2 Bouv. Law. Dic. 352, title "Possession." Under our statute, "all persons *owning* lands not held by an adverse possession shall be deemed to be seised and possessed of the same:" Rev., § 2207.

Of what kind, then, was the possession of the appellee, actual or constructive? His ownership is conceded. He had

*actually* entered upon the land, erected a saw-mill thereon, was carrying on the business of manufacturing the timber thereon into lumber and fire-wood, some of his employees residing on the land, and he was exercising *acts* of ownership generally over the premises.

Previous to his actual entry for these purposes, being the owner, he had constructive possession only, but after such entry, etc., his possession became actual. It became such because of his entry for the purpose of taking actual possession, and because he continued to exercise acts of ownership thereon, and employing and keeping persons residing upon the premises actually engaged in the business which he was there prosecuting. True, he did not himself reside thereon or make that his home, but a man may have actual possession of real property without residing upon it. He may have such possession, although there be no house thereon in which to reside: *Langworthy v. Myers*, 4 Iowa, 21; *Roberts v. Long*, 12 B. Mon. 195; *Campbell v. Thomas*, Ib. 83; *Humphrey v. Jones*, *supra*.

In the case of *Langworthy v. Myers*, *supra*, the plaintiff did not reside upon the premises, nor on land contiguous thereto, and this Court held that his entry and taking possession, and exercising acts of ownership from time to time, constituted "*actual possession*."

In order, however, to entitle the appellee to written notice of the levy and sale as contemplated by the statute, he must have been in the "actual occupation" as well as "actual possession" of the premises: Rev. of 1860, § 3318.

By the term "occupation" is meant *use or tenure*, as a house in the occupation of A.: 2 Bouv. Law Dic. 254.

An occupier is one who is in the use or enjoyment of a thing: Ib.

A mechanic is in the occupation of his shop where he carries on his business; a merchant of his store; a lawyer of his office; a farmer of his farm. It is not necessary to make his occupation complete that the mechanic should reside in his shop or upon the same lot. He is in the occupation

because he uses and enjoys it in carrying on his legitimate calling. So with the merchant, the lawyer, the farmer.

If the farmer leases his farm to a tenant, he would still have the possession, because the possession of the tenant is that of his landlord, but he would not be in the actual occupation; he has parted with that to his tenant. The tenant, after entry under the lease, has the use and enjoyment of the premises, and pays to his landlord the stipulated rent therefor. But, where the owner of land is in the actual use and enjoyment of it himself, although in such use and enjoyment he employs others to perform all the labor connected therewith, he is in its actual occupation, within the meaning of that term.

In the case before us the appellee owned the land; he used and enjoyed it in a legitimate way for his own benefit; he was prosecuting a regular business thereon; he was in its "actual occupation and possession."

It is insisted, however, on the part of appellant, that notwithstanding defendant was in "actual occupation and possession," yet this sale, having been made under a *special execution* in conformity to a decree of foreclosure of a mortgage, the sale was in obedience to the order of the Court; the officer and defendant had nothing left but obedience thereto, and that the defendant could not have been benefited by the notice in question.

This precise question was made and decided in the case of *Jenssn v. Woodbury*, 16 Iowa, 516. It was there held that the provisions of section 3318 of the Revision were applicable to all sales on execution, including sales on special executions, in the foreclosure of mortgages.

With that decision, and the reasons given in support of it, we are satisfied.

The judgment of the Circuit Court is affirmed.

*Open.*

It must be open, visible or notorious possession, such that the real owner may be presumed to know that there is a possession of the land adverse to his title, otherwise one might be disseised without his knowledge.

WHITAKER *v.* ERIE SHOOTING CLUB.

Supreme Court of Michigan, 1894.

60 N. W. Rep. 983.

GRANT, J. The complainant, Maria, is the widow, and the other complainants are the heirs-at-law of Harvey Whitaker, deceased, who died in June, 1890. Harvey Whitaker purchased the land in question in 1837. The object of the bill is to remove a cloud from their title, caused by a tax deed made by the State of Michigan January 16, 1860, to Elias W. Hodges and Andrew J. Keeney for the taxes of 1857, and a lease executed by Andrew J. Keeney to the Erie Shooting Club August 28, 1889. The defendant, Keeney, answered, claiming title by adverse possession, and asking affirmative relief, affirming his title. The Shooting Club answered, admitting the execution of the lease and of its corporation, and leaves complainants to their proofs on their other allegations.

The situation and character of the land: The land is a piece of marsh situated in the southeast corner of Monroe County, about 120 rods from the mainland, on the west, and a mile from the sea-wall of the shore of Lake Erie on the east. Between it and the mainland is mud, which is at times covered with water. Upon it is a large sulphur spring. Around the spring the land is a little higher, and on a few acres grows hay fit for use. At low water the land around this spring is from a foot and a half to two feet above the water. When the wind blows from Lake Erie the land is entirely submerged. The only way to reclaim it, so as to render it fit for cultivation, would be the erection of a dike around it several feet high. The only use to which it can ever be put, aside from the cutting of the hay around the spring, is for

hunting birds, muskrats, and mink, but its principal use is for hunting birds.

Abandonment by complainant's ancestor: From 1837 to 1892 neither the complainants nor their ancestor exercised any act of possession. For ten years prior to his death Harvey Whitaker lived in Detroit, forty miles distant. Maria S. Whitaker testified on behalf of the complainants as follows: "Q. Do you know what became of his property? A. Well, it was overflowed. We had nothing to do with it. Q. What did you do with this spring lot? A. I don't know as anything. We all supposed it went. We considered it all lost. We thought it wasn't worth anything. Q. And you abandoned it? A. Yes. Q. You never paid any taxes on it. A. No, sir, I think not. I never knew any being paid. Q. When did you first know your husband left this property? A. I knew he bought it at the time, but, as I say, we had given it up. It was overflowed, and we supposed it was worth nothing. I don't suppose he knew it was worth anything." Prior to 1860 the land was sold for taxes, to various parties, who took no steps to obtain possession.

Defendants' connection with the land: Mr. Hodges and Andrew J. Keeney knew that Mr. Whitaker had abandoned the land at the time of the purchase of the tax title. Their tax deed was placed upon record January 30, 1860. From that time to the present the taxes were assessed to and paid by them. Hodges and Keeney leased the right to trap upon the premises to various parties every year, some years receiving four or five dollars; some, twelve or fifteen; and other years receiving nothing. They also caused some willows to be planted near the spring and occasionally cut hay. No other acts of actual possession are shown, except that they occasionally went to the land to look after it, as owners of land usually do. From 1860 to the commencement of this suit, it was understood by all living in the neighborhood that this was the property of Hodges and Keeney. On May 8, 1879, Andrew J. Keeney executed to the Bay Point Shooting Club a lease of the undivided half interest of the land, which interest is now



the sole subject of controversy here, for the purpose of hunting and shooting snipe, wild fowls, and all other birds recognized as game by the laws of the State, and for all other purposes necessary and incident thereto, and for no other use or purpose. This lease was recorded November 15, 1880. This club immediately caused signs to be painted, and posted at various places around this land the following notice: "Lands of the Bay Point Shooting Club. All Trespassers will be Prosecuted. [Signed] A. J. Keeney, President." At the termination of that lease, and on August 28, 1889, Mr. Keeney executed a similar lease to the Erie Shooting Club, which was recorded March 22, 1890. During the occupancy by these clubs these signs were placed in position every spring and taken up every fall, because the ice would carry them away. Watchmen were also employed to keep off trespassers during the shooting season. These acts of possession continued from 1880 to the commencement of this suit in 1893.

The requirements of an adverse possession necessary to establish title to real estate are well understood. The difficulty arises in applying these requirements in each case as it arises. Each case, as a rule, must be controlled by its own facts and circumstances. The established rule of this Court is: "It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as are consistent with the character of the premises in the question." *Murray v. Hudson*, 65 Mich. 670, 32 N. W. 889. The occupation need not be such as to inform a passing stranger that some one is asserting title. If it be such as to notify and warn the owner, should he visit the premises, that a person is in possession under a hostile claim, it is sufficient. After long and intentional abandonment by the owner in this case, those under whom the defendants claim obtained a tax deed from the State of Michigan. They immediately placed this on record. This, of itself, was a sufficient disseisin to support an action of ejectment by the original owner: *Hoyt v. Southard*, 58 Mich. 434, 25 N. W. 385. The defendant at once commenced to exercise such acts of possession and ownership

as were consistent with the character of the land. Evidence of the general understanding in the neighborhood that they were the owners, and that it was called theirs, was held competent, as tending to establish the notoriety of defendant's possession and claim of title: *Sparrow v. Hovey*, 44 Mich. 63, 6 N. W. 93. *Pedis possessio* is not indispensable. The land need not be fenced. Buildings are not necessary. Where the possession claimed was by cutting grass and pasturing cattle each year during the season and planting trees, it was held to be evidence of a practically continuous, exclusive, and hostile possession: *Sauers v. Giddings*, 90 Mich. 50, 51 N. W. 265. Openly and notoriously claiming and using land in the only way it could be used without fencing or cultivation was held to establish adverse possession: *Curtis v. Campbell*, 54 Mich. 340, 20 N. W. 69. Cropping land, though no one was actually upon it, and nothing done thereon between harvest and re-cropping, were held to establish adverse possession: *Cook v. Clinton*, 64 Mich. 309, 31 N. W. 317. It may well be conceded that paying taxes, or assertion of title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting, is not sufficient to establish title by adverse possession. But they are all competent evidence to be considered in determining the question. The notices which were posted around this land from early in the spring till late in the fall, every year for twelve successive years, was notice of an adverse title and possession. The owner, if he visited it, could not have failed to understand their meaning. They were inconsistent with the rights of the original owner of the fee. The land was then valuable for little else than shooting. Mr. Whitaker lived within forty miles of this land for ten years, with these open, notorious assertions of title and possession posted around the land from early in the spring till late in the fall. This substantially covered all the time during which this land could be used for any purpose except for hunting muskrats. The notice denied all right to use unless authorized by the club. We need not discuss the question of possession prior to the lease of the Bay Point Shooting

Club. Ten years of adverse possession under the tax deed is sufficient. The decree will be affirmed.

*Costello v. Edson*, 44 Minn. 135; *Vandall v. St. Martin*, 42 Minn. 163; *Wood v. Springer*, 45 Minn. 299; *Watrous v. Morrison*, 33 Fla. 261; 14 S. Rep. 805; *Foulke v. Bond*, 41 N. J. L. 545; *Cornelius v. Giberson*, 25 N. J. L. 33; *Cobb v. Davenport*, 32 N. J. L. 385.

If the hostile entry is with the knowledge of the owner, notorious possession is not necessary: *Key v. Jennings*, 66 Mo. 367; *Cook v. Babcock*, 11 Cush. 206; *School District v. Lynch*, 33 Conn. 330; *Murphy v. Doyle*, 37 Minn. 113; *Scott v. Woodruff*, 4 S. W. Rep. 908.

### *Continuous.*

#### BOWEN *v.* GUILD.

Supreme Judicial Court of Massachusetts, 1880.

130 Mass. 121.

The plaintiff had owned certain lands, which defendant had possessed adversely for more than the statutory period of limitation, except that within that period the plaintiff had once entered and passed over the land to ascertain its condition, which entrance he claimed was an interruption of defendant's possession, and thereafter he brought an action of tort against the defendant for entering the close and erecting a fence thereon.

LORD, J. We have deemed it necessary in this case to consider but one of the various questions raised by the defendant. Mr. Ellis Ames, a counsellor of this Court, testified "that in August, about the year 1870, he went upon the land with Mr. Bowen, one of the plaintiffs; that they went all over the land and saw no fence, either upon the road or any other side of the land; that the land was rough and uncultivated; that bushes were growing upon a part of it; that he saw no indication that the land had been cultivated that year; that he saw no one else on the land; and that they went upon the land for the purpose of discovering, if they could, any evidence of adverse occupation upon which he could bring a writ of entry against Charles L. Guild." The presiding Judge ruled that, if the facts thus testified to were true, they constituted, as matter of law, necessarily, an interruption of an adverse pos-

session of the defendant, commencing at the time of the institution of the former suit, in August, 1857, and continuing, with such exception, to the commencement of the present action, in October, 1878, a period of more than twenty years.

This ruling seems to have been based upon a misapprehension of the decision in *Brickett v. Spofford*, 14 Gray, 514. In that case, it appears that the owner of the land went upon it in company with one who proposed to purchase it, for the purpose of ascertaining, in view of the proposed purchase and sale, the value of the land, the quantity and quality of the wood upon it, and such elements as were necessary to determine its value; and that after such entry the owner of the land gave a deed of it to the person who was at the time of their going upon the land negotiating for its purchase. The Court did not hold, as matter of law, that such entry upon the land was conclusive upon the question of adverse possession by the defendant; but held that it was evidence to be submitted to the jury, with all the other evidence in the case, in determining whether the party did make such a re-entry as to enable him to convey his estate by deed; the only question in that case being whether the plaintiff's grantor was so disseised at the time of the conveyance as that he could not effectually convey his title except by re-entry and delivery of the deed upon the land. The defendant had been in possession only two years, and his title was obtained through a levy upon the estate which had been previously made, and which was unrecorded, and therefore void as against the plaintiff, taking a deed under the judgment debtor's title without notice. If, in that case, the entry as thus made had not been followed by the assertion of title which the conveyance by warranty deed implies, and had been followed by no other act of possession during the subsequent eighteen years during which the defendant had continued to hold it, and the Court had decided that the adverse possession could not commence until after such possession, because such an entry was an interruption to the adverse possession, that decision would have been authority for the ruling. But the question there presented was an entirely

different one. It had no relation to the question of the acquisition of title by adverse possession, but only to the question whether the true owner was so disseised at the time of his grant that his deed passed no title; and in that case the decision of the Court went only to the point that the evidence was proper to be submitted to the jury upon the question whether he had in fact so repossessed himself, under an entry claiming the highest right of ownership, that of selling the land, and actually selling it, after negotiations upon it, as to make his deed effectual.

The entry in this case was followed by no act of ownership, and was simply a passing over the land for the purpose of ascertaining its condition, to see whether any use had been made of it, or whether any buildings or structures had been erected upon it, and to see whether there was any evidence of a disseisin. It did not appear that such passing over the land was in presence of the defendant, or that he ever in any mode had any knowledge of it. The circumstances under which it was made, and the time of day or night, do not appear, except as it may be inferred from the known character of the gentleman under whose direction it appears to have been done. It is consistent with the actual use by the defendant of the land upon every other day of the twenty years. It was a question for the jury whether in fact it was an interruption of the defendant's possession. That fact must be determined by them upon all the evidence in the case; and it was error in the presiding Judge to rule, as matter of law, that it was necessarily such a re-entry and reclamation of possession as to be an interruption in fact of the defendant's possession.

What is an adverse and exclusive possession, and what is an interruption of such possession, depend very much upon the character of the land, and the purposes to which it is adapted and for which it is used. The adverse possession of an outlying lot of small value, remote from the dwellings of people, suitable for pasturing or for the growth of wood, or for some other purpose of husbandry, is to be proved by evidence very different from that which establishes

the exclusive occupation of a residence or a shop or storehouse within the limits of a thickly settled business population. The rule of law is the same in both cases; but the evidence necessary to prove the fact is very different. In either case the question is: Has the adverse possession, considering the nature, situation, and uses of the land, been exclusive and continuous? The presiding Judge having ruled that this single fact, though proper to be considered, was in itself, as matter of law, an interruption of the possession, it was error.

Although there may be cases in which the occupation by the true owner may be of such a nature, and so continued, that it would be the duty of the Court, upon the truth of such facts being apparent, to rule, as matter of law, that the adverse possession had been interrupted, still the general principle is that it is a question for the jury to determine whether in fact the adverse possession has been continuous or has been interrupted: *Stevens v. Taft*, 11 Gray, 33, 35; *O'Hara v. Richardson*, 46 Pa. St. 385. See, also, *Peaceable v. Read*, 1 East, 568; *Jackson v. Wood*, 12 Johns. 242; *Van Gorden v. Jackson*, 5 Johns. 440, 467; *Mayor of Hull v. Horner*, Cowp. 102; *Fishar v. Prosser*, Cowp. 217; *Jackson v. Joy*, 9 Johns. 102; *Beverly v. Burke*, 9 Ga. 440; *De Haven v. Landell*, 31 Pa. St. 120; *Groft v. Weakland*, 34 Pa. St. 304.

Exceptions sustained.

**Continuity of possession is maintained by successive occupants, connected by privity of blood, grant, etc.**

VANDALL v. ST. MARTIN.

Supreme Court of Minnesota, 1890.

42 Minn. 163.

COLLINS, J. This is an action to determine adverse claims. The plaintiff alleged title to the land in question in fee simple, and that he had occupied and possessed it as a homestead for more than twenty-five years. Defendants denied plaintiff's

alleged title, but admitted his possession for the period of sixteen years; thus conceding the fact and character of the possession, but not for the period of time claimed by the plaintiff. Much of the testimony received by the trial Court was objected to by appellant defendants, but we have discovered no prejudicial error, especially in view of the finding of fact upon plaintiff's claim of adverse possession for more than twenty years prior to the commencement of the action. The testimony clearly justified the Court in finding that it was the intention of all parties to include in the deed of date of January 25, 1859, executed and delivered by Paul Bibeau, at plaintiff's request, to Bibeau's daughter, then plaintiff's wife, all of the land then used and occupied by plaintiffs as his farm, but held in secret trust by Bibeau. And this same intention existed when, in the year 1880, the deeds were made which, as was supposed, placed the legal title to the farm in plaintiff. Under an arrangement for an exchange of lands made between plaintiff and Mardi, before purchasing from the general government, the small tract in question was to be deeded by the latter to plaintiff. On plaintiff's solicitation Mardi deeded it to Bibeau. The testimony was ample, in connection with the facts and circumstances, to warrant the conclusion that this tract was omitted solely by mistake from the Bibeau deed, and that the same mistake followed in the deeds made in 1880. It is evident that all parties supposed, until about the year 1884, that the description in the deeds covered the land in controversy. Bibeau, although living in the neighborhood until his decease in 1865, asserted no claim to it as owner or otherwise, and, after his death, his heirs, the appellants, claimed no rights prior to the making of the final decree in Probate Court in the matter of his estate, May 27, 1887, so far as we can discover. The plaintiff has always paid the taxes. The land was fenced by him more than twenty-five years prior to the bringing of this action, and has been farmed annually for more than thirty years. In the year 1870 a dwelling-house was built thereon, into which plaintiff and his family moved from an older house upon another part of the farm. Plaintiff

has occupied this dwelling-house ever since. From the time of the Bibeau deed, in 1859, down to the deed to the daughter, in 1880, the possession of Mrs. Vandall, plaintiff living with her and carrying on the farm, was exclusive, open, notorious, adverse, and continuous, under an honest claim of ownership. Since the deed to the daughter and her deed to plaintiff (all one transaction), the possession of the plaintiff has been of the same character. Laboring under a belief that the tract in controversy had been included in the description and conveyed by the Bibeau deed—as it should have been, undoubtedly—Mrs. Vandall in good faith commenced to assert an exclusive ownership in the year 1859, and thereafter, until 1880, for more than twenty years, maintained a continuous, exclusive, and adverse possession. Title by prescription could certainly, be acquired in this way: *Smith v. Chapin*, 31 Conn. 530; *Bean v. Bachelder*, 74 Me. 202. With this belief as to ownership in her mind, she transferred actual possession of the entire farm to her husband—who believed the same as to a perfect and complete title—in the year 1880, under a deed in which existed the same defect in description, and this possession he has since retained. The disseisin of Bibeau, resulting from the adverse possession of Mrs. Vandall, was not interrupted by the transfer of possession to her husband. The successive adverse possessions were connected by the privity which exists between two successive holdings when the later takes under the earlier, as by descent, will, grant, or by voluntary transfer of possession: *Sherin v. Brackett*, 36 Minn. 152 (30 N. W. Rep. 551), and cases cited. The possession must be connected as well as continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of his possession in fact: *Smith v. Chapin*, *supra*; *McCoy v. Trustees*, 5 Serg. & R. 254. The plaintiff herein could tack his possession on to that of his wife.



While the testimony in this case may not have justified the Court below in finding, as it did, that plaintiff held adversely as early as March 1, 1856, it was obvious that Bibeau was disseised in 1859, immediately upon the execution and delivery of the defective conveyance. The testimony in support of the finding as to adverse possession for a period of at least twenty years immediately preceding the commencement of the action is abundant. It was competent to show that it was intended by the parties to include the land in question in the Bibeau deed, and that it was omitted by mistake, as tending to establish the claim that Bibeau's grantee had possession, from its date, in good faith, and with intent to hold adversely. And it was competent to show the same intention to convey, and a like omission in the deeds under which plaintiff took possession, for the purpose of presenting the relation of the possession taken by plaintiff to that relinquished by his wife.

Order affirmed.

Ramsey v. Glenny, 45 Minn. 401; Doe v. Campbell, 10 Johns. 477; Witt v. St. P. & N. P. Ry. Co., 38 Minn. 122.

*Exclusive.*

SMITH v. HITCHCOCK.

Supreme Court of Nebraska, 1893.

38 Neb. 104; 56 N. W. Rep. 791.

RAGAN, C. This is a suit in ejectment brought on November 9, 1889, in the District Court of Douglas County by Mrs. Charity Smith against Gilbert M. Hitchcock, for a part of lot 1, in Capitol Addition to the city of Omaha. This case was tried to a jury, who, under instructions of the Court, rendered a verdict for Hitchcock, and Mrs. Smith brings the case here for review.

Mrs. Smith has no paper title of any kind for any part of the property. Her claim is based wholly on possession. The record shows that on and prior to 1869 this lot, No. 1, being

668 feet in length north and south, and 218 feet in width east and west, was owned by Mrs. Annie M. Hitchcock. She died in 1887, and the lot by her will passed to her husband, the late Senator Hitchcock. He died in 1881, and the lot descended to his son, the defendant in error. About 1870, by permission of Mrs. Hitchcock and her husband, Mrs. Smith moved a small cottage she owned upon this lot 1, near the east line thereof, and lived in this cottage at that place until 1880. Mrs. Smith did laundry work from time to time during these years for the Hitchcock family and others. She also planted part of the ground near her cottage to a garden. During all these years the Hitchcock family, consisting of Mrs. Hitchcock, her husband, and the defendant in error, and others, lived upon the lot; had on it their barn, horses, cattle, and garden, and exercised exclusive ownership and control of the whole lot. During all this time it was all under one inclosure, built and maintained by the Hitchcocks; and that part occupied by Mrs. Smith's cottage was in no other manner, than by the cottage itself, separated or severed from the remainder of the lot. Mrs. Smith, during this period, by the permission and consent of Mrs. Hitchcock and her husband, and as a kind of non-rent-paying tenant at will, or sufferance, also occupied her cottage on the lot. She paid no taxes. She exercised no act of ownership over the lot or any definite portion of it. Thus matters continued until 1880, when Mrs. Smith, by the permission of Senator Hitchcock, who then owned the title to the lot as devisee of his deceased wife, and who still continued to occupy the lot with his family, removed her cottage to a point nearer the west line of said lot and some 250 feet southwest of its original location. This is the present location of the cottage. The usual occupation and control of the lot by the Hitchcocks continued as before this removal, and Mrs. Smith continued to live on uninterruptedly in her cottage. The senator died in 1881, and the defendant in error became the owner of the lot, and has since continued to reside upon it in the family homestead. In 1883 defendant in error erected three houses on a portion of

the lot now claimed by Mrs. Smith, which houses have since been occupied by tenants of the defendant in error.

In 1886 Douglas Street, 66 feet wide, was extended west across the entire lot, leaving the first location of Mrs. Smith's cottage north of said street. After the extension of Douglas Street, the defendant in error built fences on both the north and south lines of the street, thus dividing said lot into two separate inclosed portions; one being that part of said lot lying north of said Douglas Street, and on which Mrs. Smith's cottage was first located, and on which the Hitchcock homestead and the three tenant houses aforesaid are situate; the other portion being all of said lot 1 south of Douglas Street, and on which portion is now Mrs. Smith's cottage. No claim for damages was made by Mrs. Smith at the time of the extension of this Douglas Street, nor did she assert or claim any ownership over the land taken for such extension, though now she claims that the land used for such extension was her property. She asserted no claim of ownership or title to any of the property at the time of the building of the tenement houses by the defendant in error.

Mrs. Smith, to recover here, must prove either a paper title or prove ten years' open, notorious, exclusive, and adverse possession. She has no paper title. She occupied, by living in her cottage, a part of this lot openly and notoriously for ten years, but no specific or definite part of the lot other than the *situs* of the cottage itself. Her possession of the lot was also concurrent with that of the owner of the legal title. It was a mixed possession; not an exclusive one. The defendant in error, the holder of the legal title, has never been out of possession of the property claimed by Mrs. Smith, and this negatives any legal presumption that her possession was adverse to his title or possession: *Green v. Litter*, 12 U. S. 229; *Proprietors Kennebeck Purchase v. Springer*, 4 Mass. 415.

But as a matter of fact or law, was Mrs. Smith's possession of this property adverse? She entered by permission of the owner, and in 1880, by his permission, moved her cottage to another part of the same premises, not involved in this case.

To constitute her possession or occupancy adverse, she must have actually held and occupied the property as her own, and in opposition and hostility to the concurrent and constructive possession of the owner of the legal title: *French v. Pearce*, 8 Conn. 439; *Newell Ejectment*, p. 697, § 1. There is no evidence in the record that establishes, or tends to establish, the fact that Mrs. Smith's possession was an adverse one; nor that she entered into possession of these premises with the intention of claiming them as her own, or that she ever held after her entry in hostility to the defendant in error. Mrs. Smith's entry on this lot was by permission of the owner of the legal title, and her possession thereafter was permissive and not adverse; nor could it become so until such time as she began to occupy under a claim of right, with notice of such claim brought home to the owner: *Harvey v. Tyler*, 2 Wall, U. S. 328; *Allen v. Allen*, 58 Wis. 202-209; *Perkins v. Nugent*, 45 Mich. 156; *Davenport v. Sebring*, 52 Ia. 364; *Pease v. Lawson*, 33 Mo. 35; *Smith v. Stevens*, 82 Ill. 554; *Angell, Limitations*, § 354. The Court did not err in instructing the jury to find for the defendant.

Complaint is made because of the refusal of the trial Court to permit witnesses of the plaintiff in error to answer certain questions propounded to them on the trial. No tender or offer of the evidence sought to be elicited by these questions was made, and these assignments cannot now be considered: *Masters v. Marsh*, 19 Neb. 458; *Connelly v. Edgerton*, 22 Neb. 82; *Yates v. Kinney*, 25 Neb. 120; *Burns v. City of Fairmont*, 28 Neb. 866.

Another error assigned is the overruling of the motion for a new trial on the ground of newly discovered evidence. To entitle the plaintiff to a new trial on account of newly discovered evidence, it is not enough that the evidence is material. It must further appear that the applicant for a new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial: *Fitzgerald v. Brandt*, 36 Neb. 683. The proof fails to disclose such diligence on the part of the plaintiff in error as entitled her to a new trial on

the ground of newly discovered evidence; but if it did, and the evidence now claimed to be newly discovered was put into the record, it would not change the result. A new trial should not be granted on account of newly discovered evidence when such evidence, if admitted, could not change the result of the first trial: *Keiser v. Decker*, 29 Neb. 92.

The judgment of the District Court is affirmed.

*Thomas v. Inhabitants of Marshfield*, 13 Pick. 240; *Alexander v. Meyers*, 51 N. W. Rep. 140; 33 Neb. 773; *Kilburn v. Adams*, 7 Met. 33.

*Hostile or Adverse.*

DEAN *v.* GODDARD.

Supreme Court of Minnesota, 1893.

55 Minn. 290; 56 N. W. Rep. 1060.

BUCK, J. The question raised in this case is whether the plaintiff has acquired title by adverse possession to the premises described in the complaint, viz., the front half of lots 1 and 2 in block 67, in the city of Minneapolis. The action was commenced in August, 1891. In his complaint the plaintiff alleges that he is in possession, and is the owner in fee simple, of the premises above described, and that the defendants claim some estate or interest in the premises adverse to the plaintiff, and prays that the claims of the respective parties be adjudged and determined, and that title to said premises be decreed to be in the plaintiff. The defendant Goddard answered, and alleged the title in fee to be in himself. The plaintiff replied, and such reply will be referred to hereafter. Plaintiff's contention is that he acquired title by possession held adversely for such a length of time as to create a title in himself.

Under Gen. St. 1878, c. 66, § 4, the time limited for commencing actions for the recovery of real property was fixed at twenty years; but on April 24, 1889, the law was changed to fifteen years—not to take effect, however, until January 1, 1891. The law, as amended, would be applicable to actions com-

menced after January 1, 1891, and prior to the time of the commencement of this action, in August, 1891 ; but this would not render the law existing prior to the amendment inapplicable to causes of action, when there was twenty years' adverse possession before the time when the change took effect. The period, however, relied upon, need not be the twenty years immediately preceding the 1st day of January, 1891. It would be sufficient if the possession relied upon was continuous for twenty years up to any certain or definite time. Of course, the twenty years would have to be complete before the bringing of the action ; but such twenty years need not, necessarily, be those next before the time when the action is commenced. In this case, if the inception of the plaintiff's adverse possession was in the months of June or August, 1866, and became perfect by continued adverse possession until the month of June or August, 1886, then the title thereby created would not be lost or forfeited by any subsequent interruption of the possession, unless by some other adverse possession for such a length of time as would create title in the possessor.

The Court below found the allegations in the plaintiff's complaint to be true, and that he was, at the time of the commencement of this action, the sole owner, in fee, and in the lawful possession, of the premises described in the complaint, and that his grantors and predecessors in interest had been in the open, continuous, exclusive, and adverse possession of the premises, with color of title, and paying taxes thereon, for a period of twenty years, and that he was entitled to the decree and judgment of the Court declaring him to be the absolute owner of the premises. We think a title acquired by adverse possession is a title in fee simple, and is as perfect as a title by deed. The legal effect not only bars the remedy of the owner of the paper title, but diverts his estate, and vests it in the party holding adversely for the required period of time, and is conclusive evidence of such title. To say that the statutes upon this subject only bars the remedy, as some authorities do, is only to leave the fee in the owner of the paper title ; thus leaving the owner with a title, but without a remedy. We think the better and

more logical rule is to hold that the occupier of the premises by adverse possession acquires title by that possession, predicated upon the presumption or proven fact that the prior owner has abandoned the premises. Adverse possession ripens into a perfect title. This title the adverse possessor can transfer by conveyance, and when he does so he is conveying his own title, and not a piece of land where the title is in some other person, who is simply barred of any remedy from recovering it. See *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209; *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. Rep. 312, and cases there cited. Now if there is any cloud resting upon such title he has a legal right to apply to the Court and have his rights adjudicated, and the title perfected by judgment record, if the evidence sustains his claim. Considerations of public policy demand that this should be so, for the claim of title to lands can thus be found of record, instead of resting in parol, with all of its incidental dangers and trouble is establishing title.

Now, let us consider the question raised by the defendant, as to whether one of the plaintiff's predecessors, Washburn, entered into the adverse possession of the premises June 1, 1886, or August 28, 1866. The plaintiff claims such entry was on the 1st day of June, and the defendant insists that the true date, if there was any such adverse entry at all, is shown by plaintiff himself, in his reply, to be August 28, 1866. The importance of these dates arises from the fact that there is evidence tending to show an adverse possession of the premises by the predecessors of plaintiff until the middle of July, 1886; and if the period of twenty years commenced June 1, 1866, of course, the expiration of that period would be June 1, 1886, and if the period commenced August 28, 1866, the twenty-year period would expire August 28, 1886. Thus, the true date becomes material. The plaintiff, in his amended reply, inserted the following allegation, viz.: "That on or about the 1st day of June, 1886, and more than fifteen years prior to the commencement of this action, said William D. Washburn, under the deed hereinbefore recited, executed to him by said Lindley, and claiming thereby to be the owner of said premises, entered into pos-

session and actual occupation of the same." The deed referred to bears date August 28, 1866. It may be that there is sufficient undisputed evidence to show an adverse possession during this particular time; but we think that, under the circumstances, the parties are entitled to the opinion of this Court upon this phase of the case. The fault of the defendant's position is this: That he allowed the plaintiff to introduce and prove beyond dispute, by parol evidence, without objection, that Washburn entered upon these premises June 1, 1866. The rule, therefore, that the written allegations of the pleadings should control, does not apply. The defendant did not move to have the pleadings made certain and definite, nor to compel the plaintiff to elect upon which of the dates he would rely as the time of Washburn's entry upon the premises; but remained silent, and allowed the date of June 1, 1866, to be undisputably proven by the plaintiff. The allegations in the reply were repugnant as to the dates of Washburn's entry; but the defendant, by his conduct, waived his right to insist now that the date of such entry should be determined as of August 28, 1866. He is estopped by the admitted parol evidence from insisting that the written pleadings should be construed in his favor, and against the plaintiff.

There is no dispute, however, that Washburn did procure a deed of the premises from Lindley, dated August 28, 1866; and the defendant therefore contends that Washburn's entry, if adverse at all, should only be considered as having commenced on the date of the deed. To support this contention he invokes the doctrine that one who enters upon land under a mere agreement to purchase does not hold adversely, as against his vendor, until his agreement has been fully performed, so that he has become entitled to a conveyance. This doctrine is not applicable to this case. Washburn's entry and holding was not under this defendant, nor any of his predecessors holding paper title. As we have already stated, it appears that he was in possession on the 1st day of June, 1866; and whether by permission of Lindley, or by his own voluntary entry, is immaterial as to his rights against parties other



than Lindley, and Lindley is not complaining, or questioning his rights, or time of entry. Nor is defendant claiming title under Lindley. If permissive possession, with parol executory conditions attached, would not constitute adverse possession as between the parties, yet it might constitute adverse possession as against third persons or strangers. Washburn's entry was adverse as against those under whom defendant claims by paper title. If, therefore, Washburn's entry of June 1, 1866, was his own adverse act, and he so continued in possession of the premises until long after August 28, 1866, there is no need of considering the doctrine of tacking, or the necessity of the continuity of possession. Obtaining a deed to the premises from Lindley would not destroy Washburn's previous adverse possession, nor break its continuity. He has a right to strengthen his adverse claim to the premises, if possible, by as many written conveyances from other parties claiming any interest therein as he saw fit, and thus giving him color of title, and perhaps define the boundaries of the premises claimed by him.

The essential ingredients necessary to create title by adverse possession are now so well defined and understood that we shall not enter into any argument or discussion to show what they are. We merely state them in this connection that we may the more conveniently apply them to the undisputed facts in this case. "To be adverse possession must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely:" *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. Rep. 551. This leads us to the question raised by defendant—that the Court below did not find, specifically, that plaintiff's possession, or the possession of his predecessors, was hostile. But it did find that such possession was open, continuous, exclusive, and adverse during the requisite period. The greater includes the less. If it was adverse, it was hostile. In *Sedg. & W. Tr. Title Land*, § 749, it is said that "it is tautology to say that adverse possession must be 'hostile.'" Such hostility may be manifested by acts of possession and use of the premises, plainly visible, actual, open, and continuous, such as

appeared in this case, by using the premises for many years as a lumber-yard, building a barn and shed thereon in 1866 or 1867, and keeping the same on the premises until they burned down, in March, 1884, and keeping a large number of horses on the premises and in the stables for many years. Also, storing machinery, lamp-posts, castings, and other personal property, putting a large sign on the lot, with notice thereon that it was for rent, for a long term of years, were acts of hostility, as tending to show very strongly that some one was assuming dominion over the premises, and had intended to or was usurping the possession.

If, as was said by the Court in *Stephens v. Leach*, 19 Pa. St. 263, the adverse possessor "must keep his flag flying," yet it is no less essential that the actual owner should reasonably keep his own banner unfurled. The law, which he is presumed to know, is a continual warning to him that if he shall allow his lands to remain unoccupied, unused, or unimproved, and uncultivated, by adverse possession for a long period of time, fixed by law, he may be disseised thereof, and deemed to have acquiesced in the possession of his adversary. In this case the actual owners by paper title have never occupied the premises since the first owner obtained his title from the government, in 1855 or 1856. Considerations of public policy demand that our lands should not remain for long periods of time unused, unimproved, and unproductive. Taxes should be promptly paid. It nowhere appears that the owners by paper title have ever paid any taxes; but they have allowed the adverse occupants, during a period of many years, to pay nearly \$5,000 taxes upon the premises. Payment of taxes shows claim of title: *Paine v. Hutchins*, 49 Vt. 314. We can readily understand how these statutes are called "statutes of repose." The burdens of government must be met; its educational interests provided for; its judicial, legislative, and executive functions maintained; and to do this our real property must be made productive, to the end, among other things, that taxes may be raised and paid from land not subject to continual litigation, but the titles thereto quieted. If the selfish, the indo-

lent, and the negligent will not do this, there is no more merit in their claim than that of the adverse possessor, who does so, whatever may be said of the harshness of the statute of limitation. The settlement and improvement of the country, with its consequent prosperity, should be superior and paramount to the speculative rights of the land-grabber, or selfish greed of those who seek large gains through the toil, labor, and improvements of others. The hostile possession of the adverse claimants in this case fully appears. The possession has been open, visible, hostile, and notorious, as appears from the evidence. It has been exclusive, for no one else has made any claim to it. Those who have been on the premises, other than plaintiff or his predecessors, have made no claim of right, but have paid rent to the adverse claimant, or were there simply as trespassers, which would not break the continuity of possession. The intent to claim may be inferred from the nature of the occupancy. Oral declarations are not necessary. Possessory acts, so as to constitute adverse possession, must necessarily depend upon the character of the property, its location, and the purposes for which it is ordinarily fit or adapted. If a person should take possession of farm land, build a barn and shed thereon, and allow them to remain there for years, plow and cultivate and harvest the crops, paying taxes on the premises, and actually occupying them for such a period of time, as is usually done by the actual owners of such farm land, with such open, notorious, visible, hostile, and exclusive acts as would destroy the actual or constructive possession of the true owners, if continued long enough, it would ripen into a complete title, although there might not be actual residence upon the premises by the adverse claimant or possessor. The acts necessary for such purpose might be different with a city lot. The question is as to what purpose it may be ordinarily fit and adapted and reasonably used. In a large manufacturing city, with vast lumber interest, the use of a lot for piling lumber thereon, and there storing it or keeping it for sale, might be the best use to which such lot could possibly be adapted. And, as part of such business, the building of a barn and shed thereon,

for keeping and stabling horses used in procuring logs, as a part of such lumber business, would constitute a very strong ingredient of adverse possession.

The mere fact that time may intervene between successive acts of occupancy, while a party is engaged in such lumber business, as by taking his teams from such stable and shed, and using them in procuring logs to be sawed into lumber to be by him piled and stored upon such premises, does not necessarily destroy the continuity of possession. During such time, the lumber left upon the lot, the barn and shed there remaining, and various implements connected with such lumber business used upon the premises, would indicate that some one was exercising acts of domain over the lot, even though the party was occasionally and temporarily absent upon the business for which he was using such lot.

We think the whole record herein presents such a state of facts that the Court below was justified in its finding and decision. If there was error in the Court admitting testimony showing that sand was removed from the premises after the commencement of this action, it certainly could not have prejudiced the defendant. We find no prejudicial error, and the order of the Court below, denying a motion for a new trial, is affirmed.

*Sherin v. Brackett*, 36 Minn. 152; *Ballard v. Hansen*, 51 N. W. Rep. 295.

Adverse possession may extinguish a public easement: *Webber v. Chapman*, 42 N. H. 326; *St. P. & D. Ry. Co. v. Hinckley*, 53 Minn. 398. *Contra*: *Brooks v. Riding*, 46 Ind. 15.

*Entry under Color of Title.*

If one enter under color of title (being a title in appearance but not in reality), he has constructive possession of all the land, described in the conveyance and may acquire a title to the whole by adverse possession.

GATLING *v.* LANE.

Supreme Court of Nebraska, 1885.

17 Neb. 77 ; 22 N. W. Rep. 453.

MAXWELL, J. An opinion was filed in this case which is reported, 22 N.W. R. 227, the facts are therein stated. A motion for a rehearing has been filed by the plaintiff, accompanied by an elaborate brief, and as some of the questions raised are not fully discussed in the former opinion we will state our reasons for denying a rehearing: 1. The plaintiff alleges that the tax deed under which the defendants claim is void upon its face, and hence is not color of title. In *McKeighan v. Hopkins*, 16 Neb. 316, s. c. 15 N. W. Rep. 711, it was held that a tax certificate was not sufficient to constitute color of title. 'The reason is, a tax certificate does not purport to convey title. At most, it is evidence that the holder or his assignor purchased the real estate described therein at tax sale, and that, after the time of redemption has expired, if the land is not redeemed, the holder will be entitled to a tax deed. An instrument, to create color of title, must purport to convey the title to the grantee. It is not essential that it do so, however: *Bride v. Watt*, 23 Ill. 507 ; *Beverly v. Burke*, 9 Ga. 440-444. A tax deed which purports to convey the title to the grantee is sufficient color of title, under which open, notorious, exclusive, adverse possession for ten years will operate as a bar; and this, too, although on its face it may fail to recite the place of sale: *McGinnis v. Edgell*, 39 Iowa, 419 ; *Colvin v. McCune*, *Ib.* 502 ; *Sutton v. Stone*, 4 Neb. 319 ; *Rivers v. Thompson*, 43 Ala. 633 ; *Elliott v. Pearce*, 20 Ark. 508. And as the defendants have been in the open, continued, and ex-

clusive adverse possession of the premises in question for more than ten years, under claim and color of title, the action of the plaintiff is barred: *Grant v. Fowler*, 39 N. H. 101; *Farrar v. Fessenden*, *Ib.* 268; *Elliott v. Pearce*, 20 Ark. 508; *Cofer v. Brooks*, *Ib.* 542; *St. Louis v. Gorman*, 29 Mo. 593.

2. But even if the defendants entered and retained possession of the premises without color of title, still the action is barred. A person who enters upon the land of another with the intention of occupying the same as his own, and carries that intention into effect by open, notorious, exclusive, adverse possession of the premises for ten years, thereby disseises the owner; and this is so, whether the entry and possession are contrary to the right of the owner or not, if the occupant denies the owner's title and claims the land as his own: *Hamilton v. Wright*, 30 Iowa, 480; *Close v. Samm*, 27 Iowa, 503; *Solberg v. Decorah*, 41 Iowa, 401; *Yetzer v. Thoman*, 17 Ohio St. 130; *Towle v. Ayer*, 8 N. H. 57; *Melvin v. Proprietors*, 5 Metc. 15; *Brown v. King*, *Ib.* 173; *Poignard v. Smith*, 6 Pick. 172. No color of title is necessary to constitute an adverse holding: *Campau v. Dubois*, 39 Mich. 274. But one entering upon lands adversely, without any deed or color of title, is restricted to the land actually occupied by him, and is not entitled to go beyond the limits of his actual occupation: *Coburn v. Hollis*, 3 Metc. 125; *Jackson v. Schoonmaker*, 2 Johns. 234; *Hale v. Glidden*, 10 N. H. 397; *Ferguson v. Peden*, 33 Ark. 150; *Wilson v. McEwan*, 7 Or. 87; *Schneider v. Botsch*, 90 Ill. 577; *Foster v. Letz*, 86 Ill. 412; *Wells v. Jackson Manuf'g Co.*, 48 N. H. 491; *Wood, Lim.*, 514. It is impossible to harmonize the cases relating to possession without color of title. Many of the older cases, where the statute of limitations was looked upon with disfavor, and regarded as a statute of presumptions, seem to hold that, to constitute a valid and effectual adverse possession, the possession must have commenced under color of title: *Tyler, Adv. Poss.* 859 *et seq.*, and cases cited. The statute is now held to be a statute of repose, which is available against the enforcement of stale demands: *Mayberry v. Willoughby*, 5 Neb. 368. The effect of the statute

is to quiet titles to real estate by fixing a time within which the actual owner must commence his action for the recovery of the estate. If no action is commenced within the statutory period, the occupier obtains an absolute right of exclusive possession of the premises, not only against the former owner, but all the world: *Trim v. McPherson*, 7 Coldw. 15; *Abell v. Harris*, 11 Gill & J. 367; *Cooper v. Smith*, 9 Serg. & R. 26. And this rule will apply as to the land actually occupied, if the possession was adverse, whether the party held under color of title or not. As the defendants in this case were in actual adverse occupation of the entire lot for more than ten years before the commencement of the action, the action to recover possession of the lot in question is barred.

3. In November, 1858, the Code of Civil Procedure became a law in this then Territory, to take effect on the first day of April, 1859. The Act had a proper title, and the Code, as then adopted, is in substance our present Code. In 1866 the laws were revised, and all the general laws embodied in one bill, and passed by the Legislature as one Act, and is known as the "Revised Statutes of 1866." In this revision the Code is designated as the "Code of Civil Procedure." In *Miller v. Hurford*, 13 Neb. 17-19, s. c. 12 N. W. Rep. 832, the question of titles of amendatory Acts is considered, and it was held that the title of an Act was not obnoxious to the Constitution because it was to amend certain sections (naming them) of an Act (giving the title and date of approval by the Governor). This form of title is not as definite, perhaps, as could be desired, but so long as the amendments are germane to the Act amended, no Court would be justified in holding that the Act was void. Within the limits fixed by the Constitution, the Legislature has the right to select such title to an Act as may seem to it proper and right, and it is only when these limits are transcended that the Court will declare the Act unconstitutional. The amendment in this case, although general in its terms as applicable to the Code, was not void. It reduced the time within which an action for the recovery of real estate may be brought to ten years, and this provision is valid and

of full effect. The plaintiff's cause of action is therefore barred. A rehearing must be denied.

"Color of title" defined: *Brooks v. Bruyn*, 35 Ill. 392; *Tyler on Ejectment*; *Jackson v. Woodruff*, 1 Cow. 276; *Bristol v. Carrol*, 95 Ill. 93; *Swift v. Mulkey*, 17 Or. 532; *Clark v. Potter*, 32 Ohio St. 49; *Humphries v. Huffman*, 33 Ohio St. 403; *Jackson v. Warford*, 7 Wend. 62; *Ellicott v. Pearl*, 10 Pet. 412; *Wright v. Mattison*, 18 How. 50; *Murphy v. Doyle*, 37 Minn. 113.

### *Entry as an Intruder.*

**If one enter as an intruder, or under a parol gift, without color of title, he can acquire a title to only that quantity of land which he actually occupies.**

\*

#### ALLEN v. MANSFIELD.

Supreme Court of Missouri, 1892.

108 Mo. 343; 18 S. W. Rep. 901.

BLACK, J. This is an action of ejectment for a lot in the city of St. Joseph. Plaintiff appealed from a judgment for defendant. Both parties claim under Allen G. Mansfield, who died testate in the year 1867. In 1874 his widow, heirs, and devisees executed a partition deed conveying the lot in question to William Mansfield whose title the plaintiff acquired by a sheriff's deed, dated June 13, 1877.

The defendant is a colored person, formerly the slave of Allen G. Mansfield. Her defense is an alleged parol gift of the lot to her by her former master, and the statute of limitations. The proof offered in support of this defense discloses these facts: In 1865, Mr. Mansfield built a small house or shanty on the east or alley end of the lot and then moved the defendant and her two children into it. She continued to reside there until the commencement of this suit in 1886. At the time he built the shanty he had the lot surveyed and staked off. And in the year of 1865 or 1866 built a fence around the entire lot at his own expense. Three or four years thereafter a large part of the fence was washed away. Thereafter



some one, probably the defendant, reconstructed part of the fence from time to time so as to include the shanty and a part only of the lot in the inclosure. The evidence tends to show that she dug a well and planted some trees in the inclosed part, and that she, for a time at least, had a small pig-pen on the uninclosed part. Four or five witnesses, some of them colored persons, testified to conversations with Mr. Mansfield in the year 1865, in which he is reported to have said that he was going to give the property to Malinda. Some of them on further examination say he said he gave Malinda the house and lot and a cow. One of these witnesses, a colored woman, testified that Malinda wanted to go to Iowa and Mr. Mansfield wanted her to remain at St. Joseph; that Mr. Mansfield sent his daughter for Malinda, then at another house in the city; that he then said, in the presence of his daughter, the witness, and Malinda, that he would give her the lot if she would remain at St. Joseph. According to this witness the conversation was quite a formal affair; but the daughter testified that she knew of no such a conversation. The evidence of this daughter and that of another person is to the effect that Mr. Mansfield moved the defendant to the lot in question because she was not trustworthy about the house.

Plaintiff paid all of the taxes on the lot since his purchase in 1877. He offered to show that the Mansfield estate paid the taxes during the time the estate was in process of settlement, but this evidence the Court excluded. The further evidence of plaintiff is, that he had the lot surveyed in 1878; that about that date he built a three-room house on the west one hundred feet and inclosed the whole lot with a new fence; that the west one hundred feet was then uninclosed, and that the old fence around the shanty included only thirty-five or forty feet of the east end of the lot; that he was at the premises nearly every day during the construction of the house and fence, and that the defendant made no objection and set up no claim of ownership. This evidence is corroborated by persons who built the house and stands undenied. Plaintiff says he saw defendant just after his purchase, and she then asked per-

mission to remain on the lot, and he told her she could remain there until he desired to build.

At the request of the defendant the Court gave the following instructions: "If the jury believe from the evidence that about the year 1865 Allen G. Mansfield had the premises described in plaintiff's petition surveyed, built a house thereon, and verbally gave the same to defendant and put her in possession thereof, and that defendant has ever since said date been so in possession of the whole or any part thereof, claiming to own the whole of said lot, and that said possession has been open, notorious, and actual under claim of ownership, then the jury will find for defendant."

This instruction, it will be seen, directs a finding for the defendant as to the whole lot, though she may have had actual possession of only a part of it for the period of ten years. It proceeds upon the proposition that if Mansfield surveyed the lot, built a shanty upon it, verbally gave the lot to the defendant, and put her in possession, then such facts constitute color of title; that under these circumstances possession of a part will draw to it constructive possession of the whole.

It is to be observed in the first place that there is no evidence of improvements made by the alleged donee or other circumstances to take the alleged parol gift out of the statute of frauds. As stated by counsel for the defendant it is title by adverse possession, not by gift, which will defeat the plaintiff. Continuous adverse possession under a parol gift for the statutory period will not only constitute a perfect defense, as against the donor and those claiming under him, but it will confer title upon the donee: *Campbell v. Braden*, 96 Pa. St. 388; *Moore v. Webb*, 2 B. Mon. (Ky.) 282; *Outcalt v. Ludlow*, 32 N. J. L. 239; *Sumner v. Stevens*, 6 Met. (Mass.) 337; *Clark v. Gilbert*, 39 Conn. 94. In all these cases there was actual possession of the entire property embraced in the parol gift, so that they do not dispose of the question in hand. To make possession of a part of a tract of land possession of the whole, there must be color of title to the whole, and the real question is whether the facts recited in the instruction constitute color of title.

In a case like this, where there is a claim of constructive possession flowing from actual possession of a part, it is necessary to bear in mind that claim of title and color of title are different things. Claim of title does not necessarily include color of title. The definitions and descriptions of color of title given in the books are various and conflicting. It is, we think, safe to say that any writing which purports to convey land and describes the same is color of title, though the writing is invalid, and conveys no title: *Fugate v. Pierce*, 49 Mo. 441; *Hamilton v. Boggess*, 63 Mo. 231; *Hickman v. Link*, 97 Mo. 482. In *Fugate v. Pierce*, it was said constructive possession is never based upon a claim merely; "there must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries, as well as actual possession." This doctrine was approved in *Long v. Higginbotham*, 56 Mo. 245. The claim must be "evidenced by some paper, or proceeding, or relation, that makes the claimant the apparent owner of the whole:" *Crispen v. Hannavan*, 50 Mo. 536. These cases all lead to the conclusion that to constitute color of title there must be some documentary evidence, and so it is generally held: *Sedg. & Wait on Trial of Land Titles*, (2d ed.), §§ 769, 772.

There are some cases which appear to assert a different rule. In *Rannels v. Rannels*, 52 Mo. 108, the plaintiff purchased the land for his sister, but took the deed to himself. He had the land surveyed, showed it to her, built a house upon it, and then made a verbal gift of it to her. He put her and her family in possession under the survey and description in his deed. She and her family occupied the house, "and exercised open and notorious acts of ownership over the remainder of the tract up to her death; and the remainder of her family since her death." Notwithstanding these facts the question seems to have been made whether the verbal gift and delivery of possession thereunder constituted color of title "to that portion of the tract of land not inclosed nor in actual possession;" and it was held that they did. Says the Court: "It is not necessary that this color of title should be created by deed

or other instrument of writing. It may be created by an Act *in pais* without writing." Several cases are cited in support of the rule there stated. That of *McCall v. Neeley*, 3 Watts, 69, had been before and has since been noticed by this Court, and some of the observations there made held to be inapplicable to our system of land titles: *City of St. Louis v. Gorman*, 29 Mo. 593; *Mylar v. Hughes*, 60 Mo. 105.

In *Sumner v. Stevens*, *supra*, there was actual possession of the entire property, and the question of constructive possession from possession of a part under color of title to the whole does not appear to have been involved in the case. In *Bell v. Longworth*, 6 Ind. 274, Longworth claimed the land under a written assignment of a certificate of purchase from the United States, so that case, on its facts, does not appear to be an exception to the general rule, though the language used in the opinion as to what will constitute color of title is very broad. The *Rannels* case was cited with approval in the subsequent cases of *Cooper v. Ord*, 60 Mo. 420, and *Hughes v. Israel*, 73 Mo. 538. Those cases were, however, in their facts, quite unlike the *Rannels* case. The doctrine of that case was also approved in the case of *Davis v. Davis*, 10 So. Rep. 70. The *Rannels* case is clearly exceptional in its character, so far as it defines color of title, though the conclusion reached is right on the facts given in the statement. According to the statement the donee and her heirs had actual possession of the entire tract as against the donor.

As said in *Clark v. Gilbert*, *supra*: "Much has been said about an open, notorious possession, but such expressions are not applicable to a case like this. Possession taken under a parol gift is adverse in the donee against the donor, and, if continued for fifteen years, perfects the title of the donee as against the donor. The donor in such cases not only knows that the possession is adverse, but intends it to be, and there is no occasion for any notoriety. Notoriety is only important where the adverse character of the possession is to be brought home to the owner by presumption. Of course, where it is shown that he had actual knowledge that the possession was

under claim of title, and, therefore, adverse, openness and notoriety are unimportant, for no other person has any legal interest in the question or right to be informed by notoriety or otherwise." See, also, Sedg. & Wait on Trial of Land Titles, (2d ed.), § 735. On these grounds the Rannels case can stand without question or doubt, for there was, as against the donor, sufficient actual possession of the whole tract, and color of title was not necessary to a complete defense, and that case stands on no other grounds.

But in this case the instruction allows a complete defense, though defendant may have had actual possession of a part only for the statutory period of time. Possession of a part to draw to it possession of the whole, under the statute of limitations, must be under color of title. The facts that Mansfield staked off the lot, built a house upon it, made a verbal gift of the lot to defendant and put her in possession are sufficient to show adverse possession of the whole, as against Mansfield and his heirs; but such facts do not constitute color of title. The instruction is, therefore, erroneous, and should not have been given.

2. The trial Court also erred in excluding the receipts offered in evidence by the plaintiff, showing payment of taxes by the Mansfield estate. The fact that Mansfield placed the defendant in possession under a parol gift is evidence that she held adversely to his estate. On the other hand, there was evidence tending to show that her possession was not hostile. The question whether the defendant's possession was adverse, that is to say, under a claim of ownership, was an important issue in the case. The defendant went into possession in 1865, and Mr. Mansfield died in 1867. Non-payment of taxes by the defendant and payment of them by the estate is additional evidence tending to show that the possession was not under claim of ownership, and should have been received: *Gaines v. Saunders*, 87 Mo. 557-564.

3. The Court admitted the evidence to the effect that plaintiff built a house on the west end of the lot with the knowledge of the defendant, and that she made no objection and set

up no claim of title, but excluded evidence showing the value of these improvements. The more valuable the improvements, the more it became the duty of defendant to make known her claim, if any she had, and the greater the probability that she then made no claim of ownership. Evidence of the extent and of the value of the improvements should have been received.

4. Two instructions were asked by the plaintiff, but refused, concerning an estoppel as to the uninclosed part of the lot upon which the plaintiff erected the three-room house. There is evidence to the effect that, after the plaintiff purchased the lot, he saw the defendant and she obtained permission from him to remain in the shanty; that he had no notice or knowledge of the alleged parol gift; that he built the house and made the improvements believing that he was the real owner, and that defendant was present all the while, saw the improvements going on, but made no objection or claim of ownership to the lot. Under these facts, we think she should be held estopped from asserting title to the uninclosed part, and this is all the refused instructions claim. An instruction to the foregoing effect should be given.

Proprietors, etc., *v. Spring*, 4 Mass. 416; *Swift v. Mulkey*, 17 Or. 532.

Entry may be by agent or tenant: *Fleming v. Maddox*, 30 Iowa, 241; *Elliott v. Dycke*, 78 Ala. 150.

Possession by wife: *Morrell v. Ingle*, 23 Kan. 32.

Family burying-ground will constitute actual possession as to the part occupied by the graves: *Mooney v. Cooledge*, 30 Ark. 655.

Occasional trespasses, accompanied by avowals that the trespasser intends to hold possession, are not sufficient: *Ewing v. Alcorn*, 40 Pa. St. 492.

Entry under color of title must be in good faith by the grantee, who actually believes he is getting a good title: *Watts v. Owens*, 62 Wis. 512; 22 N. W. Rep. 720.

Fraud on the part of the grantor will not affect the innocent grantee: *Foulke v. Bond*, 41 N. J. L. 527.

## C

## Accretion.

**The owner of land bounded by a river is entitled to the accretions thereto made by imperceptible deposits of alluvion, whether such river is navigable or non-navigable.**

LOVINGSTON *v.* ST. CLAIR COUNTY.

Supreme Court of Illinois, 1872.

64 Ill. 56.

This action of ejectment was commenced by the county of St. Clair against Lovington and others to recover possession of certain lands on the Mississippi River. Plaintiff claimed title under an Act of Congress donating swamp lands to the county, and defendant claimed title to it by accretion. The land was bounded on one side by the river.

Mr. Justice THORNTON. If the land of the riparian proprietor was bounded by the Mississippi, his right to the possession and enjoyment of the alluvion is not affected, whether the stream be navigable or not. By the common law, alluvion is the addition made to land by the washing of the sea, a navigable river or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.

The navigability of the stream, as the term is used at common law, has no applicability to this case. If commerce had been obstructed, or the public easement interrupted, or a question was to arise as to the ownership of the bed of the stream, then the inquiry as to whether the stream was navigable or not, in the sense of the common law, might be pertinent. No such question is presented. On this branch of the case the only question is, have the United States, or the State, or the riparian owner, the right to the accretion?

If the river is the boundary, the alluvion, as fast as it forms, becomes the property of the owner of the adjacent land to which it is attached. On a great public highway, like the Mississippi, floating an immense commerce, and bearing it to every part of the globe, purchasers must have obtained lands for the beneficial use of the river as well as for the land. Can

it be presumed that the United States would make grants of lands bordering upon this river, with its turbulent current, and subject to constant change in its banks by alluvion upon the one side and avulsion upon the other, and then claim all accretion formed by the gradual deposition of sand and soil, and deprive the grantee of his river front? If he should lose his entire grant by the washing of the river he must bear the loss, and he should be permitted to enjoy any gain which the ever-varying channel may bring to him. If a great government were to undertake, under such circumstances, to dispossess its grantee of his river front, the attempt would be akin to fraud, and it would lose the respect to which beneficent laws and the protection of the citizen would entitle it.

We then assume that the Act of Congress of 1796 (1 Stat. 468, § 9), which declares all navigable rivers in a certain district, public highways, has no bearing upon the questions to be considered. The riparian owner has a right to the alluvion, whether the stream be navigable or unnavigable.

Blackstone says (2d book, 262), as to lands gained from the sea by alluvion, where the gain is by little and little, by small and imperceptible degrees, it shall go to the owners of the land adjoining. "*For de minimis non curat lex* ; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal condition for such charges or loss."

The same reasoning applies, with all its force, to the lands abutting upon the Mississippi River.

In *Middleton v. Pritchard*, 3 Scam. 510, this Court said : All alluvions belong to the riparian proprietor, both by the common and civil law.

In the case of *The King v. Lord Yarborough*, 3 Barn. & Cress, 91, land gained from the sea by alluvion or projection of extraneous matter, whereby the sea was excluded and prevented from overflowing it, was adjudged to be parcel of the demesne lands of the adjacent manor.

The question has been discussed with profound research and



great ability by the Courts in Louisiana, as to the accretions upon this same river, and the law clearly announced.

In Municipality No. 2 *v.* Orleans Cotton Press, 18 Louisiana, 122, it was declared that the right to future alluvial formations was a right inherent in the property, an essential attribute of it, the result of natural law, in consequence of the local situation of the land ; that cities as well as individuals had the right to acquire it, *pere alluvionis*, as riparian proprietor ; and that the right was founded in justice, both on account of the risks to which the land was exposed and the burden of protecting the estate. The Court further assimilated the right to the right of the owner of lands to the fruits of a tree growing thereon, and said : "Such an attempt to transfer from the owner of the land to the city the future increase by alluvion, would be as legally absurd as if the Legislature had declared that, after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city, and not to the owners of the orchards and gardens."

The same principle was declared in *Banks v. Ogden*, 2 Wall. U. S. 57, as applicable to Lake Michigan.

See, also, *The Mayor, etc., of New Orleans v. The United States*, 10 Peters, 662 ; *Jones v. Soulard*, 24 Howe, U. S. 41.

The same doctrine is fully declared in a recent case : *Warren v. Chambers*, 25 Ark. 120.

To determine the title to the accretion, we must ascertain the locality of the land of the adjacent owner. We need not enter upon a discussion of the laws of Congress and of the State, by virtue of which the county claims title, if the land previously granted by the United States was bounded by the river, and the accretion is attached to it.

Hilgard, the surveyor, testified that the accretion was all west of the Condaire tract. The only portion of the field notes we desire to call attention to is the following : "To a post on the westerly side of the river L'Abbe, or Cahokia Creek, thence down the said river or creek, with the different courses thereof," and, "thence N. 85 deg. W. 174 poles to a post on the bank of the Mississippi River, from which thence N. 5 deg. E. *up the*

*Mississippi River, and binding therewith* (passing the southwesterly corner of Nicholas Jarrot's survey No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post northwesterly corner of Nicholas Jarrot's survey No. —, claim No. 100." This survey was made in 1815. From the copy of the plat of it, from the custodian of the United States surveys, it will be seen that the line along Cahokia Creek meanders with the stream, which was sinuous, and hence the call in the notes, "down the said creek with the different courses thereof."

A further examination of the plat will show that, though the line from "a post on the bank of the Mississippi River," "to a post northwesterly corner of Nicholas Jarrot's survey, claim No. 100," is a straight line, the river bank, as indicated by the plat, was also straight in 1815. The Condaire survey embraces three militia claims, which had been surveyed before, and which were confirmed to Jarrot.

One of the Jarrot surveys begins on the bank of the Mississippi, and thence to a point in the river, etc.

The defendants traced title from patent confirmatory of these several surveys, and they also proved title to "Bloody Island," which, when surveyed in 1824, was three-fourths of a mile north of the tract in controversy.

In behalf of the county, it is assumed that the patent to survey 579 contains no indication that the river is the boundary; that the west line of the Condaire claim, being the line next to the river, is identical with the west line of the militia claims; that Condaire took no portion of the militia claims, but only the fractions east of them and between them and Cahokia Creek; that the lands granted were bound by specific lines, and not by the river, and therefore the grants are limited grants, and the land in dispute is outside of their boundary lines.

Concede that the Jarrot survey did not make the river the boundary, by specific call, yet its beginning was on the bank of the river, opposite St. Louis, and thence it followed the river to a point in it. Hilgard testified that this survey was on the old bank of the river. It is, then, evident that at this time,

which was some years prior to the Condaire survey, there was no land between the western line of the Jarrot survey and the river. All the plats introduced in evidence show that the river bank was straight, and the point in the river must have been made for the purpose of obtaining the bearing of the witness tree, a sycamore, 250 links from the point. It is manifest that the river was the boundary, and whether the grant was bounded *by* the river, or *on* the river, can make no difference as to the question involved. The grant may be so limited as not to carry it to the middle of the river, and yet not exclude the right to the alluvion.

A large number of cases have been cited by one of the counsel for the county, to establish that a grant is not carried to the centre of a stream, but stops at the bank, if the grantor describes the line as upon the margin, or at the edge or shore, and that these terms become monuments, and that they indicate an intention to stop at the edge or margin of the river.

This may be good law, and not affect the right of the defendants. They do not claim the bed of the stream, and the proof shows that the river does not run over the land in dispute at ordinary stages of water. Their claim, if established, does not obstruct the river or interfere with its free navigation and use by the public.

But the Condaire survey not only covers the Jarrot surveys, but extends beyond them. It not only takes any fractions between the Jarrot surveys and Cahokia Creek, but the land, if any, between their western line and the river. The Condaire survey run up the river and binding therewith, and *passed* the southwesterly corner of the Jarrot survey, No. 579, at 6 poles. Language could not make it more plain that the western line was bounded by the river, and the plats confirm this view.

The only construction to be given to these grants is, that the United States had conveyed the land to the bank of the Mississippi. It follows that the grantees were riparian proprietors, and are the owners of the alluvial formations attached to their lands.

Unless such construction be given and adhered to rigidly, almost endless litigation must ensue from the frequent changes in the current of the Mississippi, and the continual deposits upon one or the other of its banks; the value of land upon its borders would depreciate, and the prosperity of its beautiful towns and cities would be seriously impaired.

Counsel say at the time the locations were made there was no advantage of river front, no wharfage and no wood-yards. This may be true, but even at this early period the grantees must have realized the vast importance of the Mississippi to them, and to all the people of the States bordering upon it, in the grand future soon to be unfolded. They must have seen the necessity and accepted the grants for the purpose of securing an approach to the river.

From the proof, before 1819 a ferry was established across the river near to the land in dispute, and has been since in constant operation. Before the grant of the swamp and overflowed lands to the State, in 1850, a city had sprung up on the Missouri side of the river, and a prosperous village was growing on the Illinois shore. Before the survey by the county of the swamp lands, in 1852, a charter for a railroad had been granted by the State, which resulted in the construction of the road from Terre Haute, in the State of Indiana, to Illinoistown. Prior to the grant made by the United States in 1870, as shown by the plat offered in evidence, a number of railroad tracks had been constructed upon the ground formed by accretion, and an elevator erected and dykes for the use of wagons, and a large expenditure of money made by the ferry company for the preservation of the banks recently made.

It needed no prophetic eye to foresee, prior to the year 1850, these grand improvements which bring the products of an empire to the father of waters. Their absolute necessity and consequent construction, as an outlet for our immense produce, had been known for more than a quarter of a century before their completion. Their usefulness will be greatly crippled, and the public thereby seriously suffer, if ready access to the river was denied.

It would be a strained construction to hold that in making these grants the United States reserved all accretions, and thus to deprive these proprietors of ferry privileges and the beneficial enjoyment of the river.

It is further contended that the lands are not accretions, as they were made by artificial, and not natural, means. It is not at all certain from the proof, that the accretions were entirely the result of artificial structures, or that they would not have been formed without them. The construction of coal dykes facilitated the formation, and the soil was prevented from washing away by the expenditure of money by the ferry company.

Jonathan Moore, who had known the river since 1813, testified that the accretions had commenced to form before the construction of the dykes, and McClintock and Jarrot testified to the same effect.

Concede, however, that the dykes, to some extent, caused the accretions; they were not constructed for such purpose, and appellants had nothing to do with their erection. They were built for the accommodation of the public and to secure an approach to the ferry-boats, and the city of St. Louis did some work to preserve its harbor. Improvements were also made by the United States to throw the channel of the river toward the city.

The fact that the labor of other persons changed the current of the river, and caused the deposit of alluvion upon the land of appellants, cannot deprive them of a right to the newly-made soil.

Chancellor KENT, after declaring the common-law doctrine, that grants of land bounded on the margins of rivers, carry the exclusive right of the grantee to the centre of the stream, unless there is a clear intention to stop at the edge, says: "The proprietors of the adjoining banks have the right to use the land and water of the river, as regards the public, in any way not inconsistent with the easement; and neither the State nor any other individual has the right to divert the stream and render it less useful to the owners of the soil:" 3 Vol. Com. 427.

If portions of soil were added to real estate already possessed, by gradual deposition, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to the addition. Upon no principle of reason or justice should he be deprived of accretions forced upon him by the labor of another without his consent or connivance, and thus cut off from the benefits of his original proprietorship. If neither the State nor any other individual can divert the water from him, artificial structures, which cause deposits between the old and new bank should not divest him of the use of the water. Otherwise, ferry and wharf privileges might be utterly destroyed, and towns and cities, built with sole reference to the use and enjoyment of the river, might be entirely separated from it.

In *Godfrey v. The City of Alton*, 12 Ill. 29, the public landing had been enlarged and extended into the river, both by natural and artificial means, and this Court held that the accretions attached to and formed a part of the landing.

In *New Orleans v. The United States*, 10 Peters, 662, the quay had been enlarged by the levees constructed by the city to prevent the inundation of the water, and the Court held that this did not impair the rights of the city to the quay.

In *Jones v. Soulard*, *supra*, the intervening channel between the island and the Missouri shore had been filled up, in consequence of dykes constructed by the city, and the riparian owner succeeded.

In the case at bar the accretions have not been sudden, but gradual, as we gather from the testimony. The city of St. Louis, to preserve its harbor, and to prevent the channel from leaving the Missouri shore, threw rock into the river, and the coal dykes were made to afford access to boats engaged in carrying across the river. The ferry company protected such accretions by an expenditure of labor and money.

The accretions, then, are partly the result of natural causes and structures and work erected and performed for the good of the public. Appellants should not thereby lose their frontage

on the river and be debarred of valuable rights heretofore enjoyed. This would be a grievous wrong, for which there would be no adequate redress.

The judgment of the Circuit Court is reversed and the cause remanded.

State *v.* Buck, 15 S. Rep. 531; Griffin *v.* Kirk, 47 Ill. App. 258; Crandall *v.* Allen, 118 Mo. 403, 24 S. W. Rep. 172; Bouvier *v.* Stricklett, 59 N. W. Rep. 550, 40 Neb. 792; Cooley *v.* Golden, 117 Mo. 33, 23 S. W. Rep. 100; Gill *v.* Lydick, 59 N. W. Rep. 104, 40 Neb. 508; Winnebepesaukee Camp-Meeting Assn. *v.* Gordon, 29 Atl. Rep. 412; Coulthard *v.* Stevens, 50 N. W. Rep. 983, 84 Iowa, 241; Nebraska *v.* Iowa, 143 U. S. 359; Nebraska *v.* Iowa, 145 U. S. 519.

## d

### Dereliction.

**Where the water of a river or lake, whether navigable or otherwise, recedes slowly and imperceptibly, and the land before covered by water is left dry, such land belongs to the riparian owner from whose shore the water has so receded.**

### WARREN *v.* CHAMBERS.

Supreme Court of Arkansas, 1867.

25 Ark. 120.

COMPTON, J. This was a bill in chancery, exhibited by Samuel H. Warren against William E. Chambers, as administrator of Stephen Bonnell, deceased, for an abatement in the price of certain lands which Bonnell sold to the complainant.

At the final hearing the bill was dismissed, and the complainant appealed.

The ground on which an abatement of the purchase-money is sought, is that Bonnell has no title to a portion of the land embraced in his deed to the appellant. The land sold was bounded on Tucker's Lake, according to the original survey of the meanders of the lake, made by authority of the United States. Shortly before the sale to the appellant, the meanders of the lake were again surveyed, when it appeared that there

was a strip of land lying between Bonnell's land, as originally run, and the lake, which had become dry by recession of the water. This strip was conveyed with the other land, and is described in Bonnell's deed as "the swamp land recently surveyed." The evidence showed that the water receded gradually—continuing to do so through a series of years.

Waiving other questions that have been discussed, we will proceed to determine whether Bonnell had title to the strip of land above indicated ; for, if he had, then this controversy is ended, and the decree of the Circuit Court below must be affirmed. The question presented involves an examination, to some extent, of the doctrines of alluvion and dereliction. Alluvion, according to the English common law, is an addition made to land by the washing of the sea, a navigable river, or other stream, where the increase is so gradual in its progress that it cannot be perceived how much is added in any moment of time. Land thus formed belongs to the proprietor of the adjacent land to which it is attached. Dereliction, according to the same authority, is a recession of the waters of the sea, a navigable river, or other stream, by which land that was before covered with water is left dry. In such case, if the alteration takes place suddenly and sensibly, the ownership remains according to former bounds ; but if it is made gradually and imperceptibly, the derelict or dry land belongs to the riparian owner from whose shore or bank the water has so receded : Woolrych on Water-Courses, marg. pp. 29, 34, 35, 46, 47, and authorities there cited. And the reason, as given by Blackstone, why alluvial and derelict land, gained by imperceptible degrees, belongs to the owner of the adjoining land, is that *de minimis non curat lex*, and because such owners, being often losers by the breaking in of the water, or at charges to keep it out, this possible gain is a reciprocal consideration for such possible charge or loss : Bl. Com., vol. 2, 262.

In this country, these rules of the common law have been applied to lake as well as other waters. Thus, in *Murry v. Sermon*, 1 Hawks, 56, decided by the Supreme Court of North Carolina, the defendant in ejectment claimed title to the land



in dispute, which was bounded by Mattamuskeet Lake, under a patent dated in 1761; and the plaintiff claimed under a grant of recent date, covering lands between the defendant's lines and the lake. Both parties introduced evidence as to what had been actually run for the lines of the defendant's land; and the Court below instructed the jury to find for the defendant, no matter whether the lake had receded or not; for, in either case, it remained his boundary. This was held to be erroneous, and a new trial was awarded, in order that the jury might find the fact whether the waters of the lake had receded gradually and imperceptibly, or suddenly and sensibly, from the land in controversy, because, on *that* question, the Court said, the rights of the parties depended. So, in *Banks v. Ogden*, 2 Wall. 57, recently determined in the Supreme Court of the United States, it was held that accretion by alluvion from Lake Michigan belonged to the proprietor of the land bounded by the lake. It is true that, in both of these cases, lakes are navigable, and in the case before us, evidence was introduced in the Court below to prove that Tucker's Lake is navigable; but in such cases, it is immaterial whether the water is navigable or not. In England, from whence we derive the doctrine of alluvion and dereliction, and where it is said to be applicable to streams generally (*Woolrych on Waters*, marg. p. 56) no river is navigable, in a common-law sense, above the point where the tide ebbs and flows, though it may be so, in fact; and this rule has been adopted in most of the American States: *Angell on Water-Courses*, § 542, *et seq.*, and cases there cited. Whether a river is navigable, in a technical common-law sense, or in the ordinary acceptation of the term, or whether it is navigable or not, may become an important inquiry in cases touching the right of the public to use it as a highway, and for commercial purposes. So, a like inquiry would be pertinent in cases involving the ownership of the bed of the stream, as between the government, or those claiming under it, and the riparian proprietors; because, at common law, the bed of a river belongs to the government so high up only as it is navigable in a technical sense—that is, as

far as the tide ebbs and flows; and above that point it belongs to the riparian owners; each—where their lands lie on opposite sides of the river—owning to the middle or thread of the stream. But whether a river or other water is or is not navigable can in no way affect the right of the riparian proprietor to such additions as may be made by alluvion or dereliction. His right rests altogether on another and different foundation. The facts to be ascertained are the local situation of the land and the mode by which the increase has been added. If the land is contiguous to the water and the addition is made slowly and insensibly, his title to such addition is complete. In *Municipality No. 2 v. Orleans Cotton Press*, 18 La. Rep. 122, it was decided that the right to future alluvial formation was a vested right inherent in the property, and an essential attribute of it, resulting from natural law, in consequence of the local situation of the land to which it attaches; and that it was an accessory to the principal estate or land, which cities as well as individuals might acquire, *jure alluvionis*, as owner of the front or riparian proprietor; and that the right was founded in justice, arising from the risks to which the land was exposed, and from the burden of keeping up levees or embankments in front of the river to protect the estate. And in *Banks v. Ogden*, *supra*, the Supreme Court of the United States said: "The rule governing additions made to land, bounded by a river, lake, or sea, has been much discussed and variously settled, by usage and by positive law. Almost all jurists and legislatures, however, both ancient and modern, have agreed that the owner of the land, thus bounded, is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself."

The testimony in the record brings the case before us clearly within the rules of law to which we have referred. The conclusion, therefore, is that the appellant acquire title to the derelict land, under the conveyance from Bonnell; and that, consequently, the decree must be affirmed.

### *Islands.*

**A grant of lands without reservation, bounded by a non-navigable river, vests in the grantee the title to unsurveyed islands between the mainland and the centre of the stream.**

#### CHANDOS *v.* MACK.

Supreme Court of Wisconsin, 1890.

77 Wis. 573.

COLE, C. J. There is no dispute about the facts in this case, but the counsel disagree as to the law arising upon those facts. The action is ejectment, brought by the plaintiff's intestate, who claimed to be the owner, as riparian proprietor, of an island in the Wisconsin River, a navigable stream. She held and owned under various mesne conveyances the title derived from the general government of lot 4 in section 17, township 22, range 6 east, which lots lie on the main west bank of the river, opposite to the island in controversy. She claimed that she was entitled to the possession of this island by virtue of the grant of the general government of lots 3 and 4 to those under whom she derived title, except as to certain rights which the defendants have under a deed that is mentioned in the evidence, but which does not affect any question in issue here.

The island lies near the west bank of the river, as we have said, opposite lots 3 and 4; is west of the main channel and west of the thread of the stream, and also west of the main navigable portion thereof. It is separated from the west bank of the river by a narrow channel or slough, which varies in width from 95 to 100 feet, and is separated from the east bank

of the river by a channel which varies in width from 320 to 700 feet. The channel between the island and the west bank of the river has not been used since the settlement of the country for purposes of navigation, except to run out lumber manufactured at the mills on the main land on the west bank. The portion of the river used for the purpose of navigation is the main channel east of the island. The island is about 1,250 feet in length, and varies in width from 70 to 300 feet; it is a rocky formation, covered with a thin, sandy soil, and was originally covered with timber, which has been removed. It lies up and down the river, nearly parallel with the thread of the stream. It is not overflowed in ordinary freshets, but is substantially submerged in extraordinary floods. The island contains between two and three acres of land. When the general government, by its agent, surveyed and platted lots 3 and 4, and the lands on either side of the river opposite the island, it made no survey or plat of the island or of any part of it; nor has the government ever surveyed and platted it, although the location of the island is marked upon the government plat of the survey of the lands opposite and adjacent thereto. The government many years since disposed of all its lands on the river opposite and adjacent to the island, and there is nothing which tends to show that the government intended to reserve the island as a part of the public domain. The island is referred to in the field-notes of the meandered line, but it was not surveyed, though its location is marked upon a plat of surveys, so the fact of its existence was not overlooked by the agents of the government when such surveys were made.

Now, the question in the case is, To whom does the island belong? Did it pass to the purchasers of lots 3 and 4 on the banks of the river opposite to it? The island lies between these lots and the middle of the river, and there is nothing to show, as we have said, that the government intended to reserve any right or interest in the island. As there was no such reservation, the presumption is that the government did include it and pass all title to it to the purchaser.

On the part of the plaintiff, it is insisted that the title did

pass to the purchaser of lots 3 and 4 on the west bank of the river. The position of the learned counsel is this: He says when the general government, by its agents, surveys a section of land lying partly in a navigable stream, which embraces islands of various sizes in such stream, subdivides the entire section into such lots and subdivisions as it sees fit, and leaves some such islands unsurveyed, and places the same in market, and disposes of all said lots and subdivisions so surveyed and platted; that then it has parted with its entire interest in the section to the purchasers, who, as riparian proprietors, take under their respective grants to the middle of the stream; that, under such circumstances, the presumption is that the government intended to make no reservation, but intended that all its title should pass by its grant, as in case of a private conveyance. It seems to us there is great force of reason and much good sense in this view of the law. In this State the settled rule is that a grant by an individual of land which is bounded on a navigable stream vests in the grantee the title in the bed of the river to the thread of the stream, subject to the public right of navigation. The cases in this Court where this doctrine has been laid down are numerous, but are so familiar to the profession that it is unnecessary to cite them. The precise question, however, here presented—whether the title of an unsurveyed island between the shore and the middle of the stream would pass to the purchaser—has not been directly decided; but we see no principle of law or good reason for holding that it would not so pass. The inference certainly is very strong, when the government leaves a small island in a navigable river, lying between the shore and the middle of the stream, unsurveyed, and sells all the surveyed islands and all the lands on both sides of the river, that it intends to abandon all right to such unsurveyed island and let it pass to the riparian owners of lands on the river as an incident to its grant. It seems formerly to have been the policy of the government to survey islands omitted from the general survey, and sell them, but, from a letter of the acting commissioner

of the general land office, which was introduced on the trial, it appears that this practice has been abandoned because it was found disadvantageous to the public interest, and applications for such surveys are no longer entertained. This item of evidence gives additional strength to the inference as to the effect of the grant itself from the government—that, where no right is reserved, the grant of lands on the bank of the river vests in the purchaser the title of any unsurveyed islands lying between the main land and the centre of the stream, since the government no longer desires to assert any interest to an island thus situated and omitted in the original survey.

“In the case of *Middleton v. Pritchard*, 4 Ill. 510, the Supreme Court of Illinois held that, when a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act which indicates an intention to make such reservation, the grant includes all that would pass by it if it were a private grant; and that, as the United States had not imposed any limitation upon its grant of the land in question, which was an island in the Mississippi River, separated from the adjoining land by a slough, the title of the riparian owners extended to the thread of the river and included the island.” Gould, *Waters*, § 69. So, “in *Railroad Co. v. Schurmeir*, 7 Wall. 272, the question was as to the title to an island in the Mississippi River, which, at the time of the survey, was a mere sand-bar, about 90 feet wide and 160 feet long, separated from the main land by a slough or channel 28 feet wide. The island was submerged at high water (of which no notice was taken in making the survey), and the slough was insignificant in comparison with the main river. At the time of the action, the sand-bar had been filled in and covered with valuable improvements, and the contest was between the owner of the adjoining fraction and a railroad company which claimed the bar under a new survey made by a United States surveyor and a Congressional grant of certain odd-numbered sections. It was held that the sand-bar was included in the first survey

as a part of the main-land :'' Gould, Waters, § 77. See same case, *Schurmeir v. St. P. & P. R. R. Co.*, 10 Minn. 82.

It seems to us that the decision in the last case is decisive of the one before us. It is true, as observed by plaintiff's counsel, there are facts in the case at bar much stronger in favor of the plaintiff than in the *Schurmeir* case. The general government had actually conveyed the island in controversy there, and attempted to grant it to the State of Minnesota for certain purposes, and the defendant claimed under the State. But in the case before us, there is no pretense that the government has ever surveyed or attempted to convey this island as a lot separate from the survey and conveyance of lots 3 and 4 on the adjacent main shore, or that it has ever claimed, or now claims, to be the owner of the island, nor is there any pretense that the patent of the general government, issued on the sale of those lands, reserved any right or interest that would ordinarily pass, by the rules of law, to the patentee, or that it did any act indicating an intention to make a reservation. The quantity of land included in the island was never ascertained or attempted to be sold, and we think it must be deemed to have been included in lots 3 and 4, and to belong to the riparian owner of those lots.

This view renders it unnecessary to consider the question whether the plaintiff acquired any title from the State by virtue of the patents offered in evidence.

By the Court: The judgment of the Circuit Court is affirmed.

*Chandos v. Mack*, 10 L. R. Ann. 207. See note.

Riparian rights of cities: *Sweeney v. Shakespeare, Mayor, et al.*, 34 Am. and Eng. Corp. Cases, 139; note.

*The thread of the river* is the middle line between the two shores: *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 552.

## e

**Title by Abandonment.**

*Incorporeal hereditaments* may be lost by abandonment, but one cannot divest himself of the legal title to land by abandoning the same.

**SCHOOL DISTRICT v. BENSON.**

Supreme Judicial Court of Maine, 1850.

31 Me. 381.

The school district occupied certain land adversely to the owner for more than twenty years, by erecting upon it a woodshed. The former owner informed the school agent that the woodshed was on his land, and requested its removal, and the agent, supposing the district had no title to the land, removed it, and the district paid the necessary expenses thereby incurred. Afterward the district issues a writ of entry and contends that, having acquired title by adverse possession, it was unable to divest itself thereof by parol.

WELLS, J. The jury were instructed that if, in 1847, the agent of the school district, at the request of the defendants, removed said wood-house where it now is, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges, then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive, and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession, and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover the said land in this suit.

It is true that a mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert a dominion over the fee. But the terms open, notorious, adverse, and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseisin, and the acts which they describe will have that



effect if not controlled or explained by other testimony : *Little v. Libby*, 2 Greenl. 242 ; *The Proprietors of Kennebec Purchase v. John Springer*, 4 Mass. 416. An adverse possession entirely excludes the idea of a holding by consent.

If the plaintiffs have held the premises by a continued disseisin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same, is barred by limitation : Stat., c. 147, § 1.

A legal title is equally valid when once acquired, whether it be by a disseisin or by deed, it vests the fee simple although the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseisin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof, and a continued disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed.

No doubt a disseisor may abandon the land, or surrender his possession by parol, to the disseisee, at any time before his disseisin has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title obtained by a disseisin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an undisputed title by deed ;

but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding upon them. A parol conveyance of lands creates nothing more than an estate or lease at will: Stat., c. 91, § 30.

The exceptions are sustained and a new trial granted.

3 Wash. R. P. 67.

Some Courts have held that abandonment of land acquired by possession is conclusive proof that the former holding was not adverse: *Vickery v. Benson*, 26 Ga. 589; *Church v. Burghardt*, 8 Pick. 327.

Easements may be lost by abandonment: *Dyer v. Sanford*, 9 Met. 395-402; *Hatch v. Dwight*, 17 Mass. 289.

Equitable estates may be so lost.

See further: *Bausman v. Kelley*, 38 Minn. 204; *Gregg v. Blackmore*, 10 Watts, 192.

## f

### Estoppel.

**Title to land may be acquired: (1) By estoppel in deed; (2) By estoppel in pais.**

### *Deed.*

**Where a grantor conveys land, with covenant of warranty, to which he has no title at the time, and afterward acquires title thereto, it vests *eo instanti* in the former grantee.**

### PIKE v. GALVIN.

Supreme Judicial Court of Maine, 1848.

29 Me. 183.

SHEPLEY, J. The title of both parties to the demanded premises is derived from Artemas Ward, who, by his agent Robbins, made a contract in writing, on October 26, 1820, to convey a tract of land including the premises to Theodore Jellison upon the performance of certain conditions therein stated. Jellison appears to have entered into possession, but does not appear to have performed the conditions. On July 7, 1823, Jellison assigned that contract to the demandant, and on the same day made a deed of release purporting to convey the same tract of land to the demandant. Artemas Ward on

October 27, 1825, by a deed containing covenants of warranty, conveyed a larger tract of land including the tract before named, to Jones Dyer, Jr., who, on July 11, 1829, conveyed to Theodore Jellison the tract of land described in his deed to the demandant. Jellison, on May 9, 1833, conveyed the premises demanded to Stephen Emerson. These conveyances were all duly recorded. The defendant is the tenant of Joseph Wyeth and Stephen G. Bass, who have exhibited a title derived from Stephen Emerson. The demandant has never been in possession of the land described in his deed from Jellison, but Jellison and those claiming title from Ward through Jellison have always been in possession.

As Jellison had no title when he made his deed on July 7, 1823, the demandant can have none, unless that acquired by Jellison on July 11, 1829, inured to him.

The deed from Jellison to the demandant contains no covenants but the following, "so that neither I, the said Jellison, nor my heirs, or any other person or persons claiming from or under me or them, or in the name, right, or stead of me or them, shall or will by any way or means have, claim, or demand any right or title to the aforesaid premises or to any part or parcel thereof forever."

Without entering upon a discussion of the doctrine or the different aspects of it presented in the very numerous cases, which have been decided respecting the effect of covenants contained in a conveyance of land, to transfer to the vendee by inurement, estoppel, or otherwise, a title subsequently acquired, it will be sufficient for the present purpose, to state a couple of positions, which appear to have been asserted or admitted in many of them.

1. When one has made a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired will be transferred to the vendee, or the vendor and those claiming under him will be estopped to deny it.

Such is the doctrine in this State: *White v. Erskine*, 1 Fairf. 306; *Lawry v. Williams*, 13 Maine R. 281; *Baxter v. Bradbury*, 20 Maine R. 260.

In New Hampshire: *Kimball v. Blaisdell*, 5 N. H. R. 533.

In Vermont: *Middlebury College v. Cheney*, 1 Vermont R. 336.

In Massachusetts: *Somes v. Skinner*, 3 Pick. 32; *White v. Patten*, 24 Pick. 324.

In New York: *Jackson v. Matsdorf*, 11 Johns. R. 91; *Jackson v. Bradford*, 4 Wend. 619; *Pelletreau v. Jackson*, 11 Wend. 110.

In Ohio: *Hill v. West*, 8 Ham. 222.

In the Courts of the United States: *Terrett v. Taylor*, 9 Cranch, 23; *Mason v. Muncaster*, 9 Wheat. 455; *Stoddard v. Gibbs*, 1 Sum. 263.

Against these and other decisions to the same effect it has been contended, that "the old common-law warranty has no practical operation under the system of conveyancing employed in this country, except in the single case of release with warranty, to a party in adverse seisin of an estate, and of a subsequent descent of the right of entry or action to the warrantor." And that "the doctrine of estoppel in deeds cannot be based upon that of warranty:" *Doe v. Oliver*, Smith's L. C. 460, in note. If the question could be considered as open to discussion, it might be worthy of deliberate consideration. But it would seem to be too late to entertain it.

2. Where one has made a conveyance of land by deed containing no covenant of warranty, an after-acquired title will not inure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance.

There is an irreconcilable difference in the decided cases respecting this proposition. It is believed, however, to be fully established by the better considered opinions; and to be in accordance with well-established principles.

It is sustained in this State by the cases of *Allen v. Sayward*, 5 Greenl. 227, and *Ham v. Ham*, 14 Maine R. 351, and opposed by the case of *Fairbanks v. Williamson*, 7 Greenl. 96.

In New Hampshire it is sustained by the case of *Kimball v. Blaisdell*, 5 N. H. R. 533.

In Massachusetts it is sustained by the cases of *Somes v. Skinner*, 3 Pick. 61; *Blanchard v. Brooks*, 12 Pick. 47; *Comstock v. Smith*, 13 Pick. 116, and opposed by the case of *Trull v. Eastman*, 3 Metc. 121.

In Connecticut it is sustained by the case of *Dart v. Dart*, 7 Conn. R. 250.

In New York it is sustained by the cases of *Jackson v. Wright*, 14 Johns. R. 193; *Jackson v. Bradford*, 4 Wend. 619; *Pelletreau v. Jackson*, 11 Wend. 110; *Jackson v. Waldron*, 13 Wend. 178. And it may be considered as opposed by the cases of *Jackson v. Bull*, 1 John. Cas. 81, and *Jackson v. Murray*, 12 Johns. 201. If they be so considered, they were overruled by the case of *Pelletreau v. Jackson*.

In Ohio it is sustained by the case of *Kinsman v. Loomis*, 11 Ohio, 475.

The only suitable inquiry to be entertained in this State is, whether our own case of *Fairbanks v. Williamson*, although the doctrine asserted in it may have been approved elsewhere, as well as in the case of *White v. Erskine*, can upon sound principles be sustained. The deed in that case contained no covenant but that of *non-claim*. The ground upon which it was decided, that a title subsequently acquired inured to the vendee, appears to have been, that the covenant of non-claim was "a covenant real, which runs with the land and estops the grantor and his heirs to make claim, or set up any title thereto."

Covenants, which relate to the land, are said to run with the land: *Sale v. Kitchingham*, 10 Mod. 158; *Norman v. Wells*, 17 Wend. 136. But a covenant which may run with the land, can do so only when the land is conveyed. It can only run, when attached to the land, as its vehicle of conveyance: *Spencer's Case*, 5 Coke, 17 b; *Lucy v. Levingston*, 2 Lev. 26; *Lewes v. Ridge*, Cro. Eliz. 863; *Bickford v. Page*, 2 Mass. 460; *Slater v. Rawson*, 1 Metc. 456; *White v. Whitney*, 3 Metc. 81; *Clark v. Swift*, 3 Metc. 390; *Chase v. Weston*, 12 N. H. 413; *Garfield v. Williams*, 2 Verm. 327; *Beardsley v. Knight*, 4 Verm. 471; *Mitchell v. Warner*, 5 Conn. 497; *Kane v. Sanger*, 14 Johns.

89; *Beddoe v. Wadsworth*, 21 Wend. 120; *Garrison v. Sandford*, 7 Halst. 261; *Randolph v. Kinney*, 3 Rand. 394; *Backus v. McCoy*, 3 Ham. 211; *Allen v. Wooley*, 1 Blackf. 149. The cases of *Kingdom v. Nottle*, 1 M. & S. 353, and 4 M. & S. 53, are denied to have been correctly decided in *Mitchell v. Warner*, 5 Conn. 497, and in *Clark v. Swift*, 3 Metc. 390. Kent, also in speaking of covenants, which run with the land says, "they cannot be separated from the land and transferred without it, but they go with the land, as being annexed to the estate:" 4 Kent's Com. 472, note b.

Admitting the covenant in the deed, alluded to in *Fairbanks v. Williamson* to be a covenant that might run with the land, it could not run or be transferred by law, to the assignee of the grantee, so as to enable him to derive any benefit from it. Nor could it operate in his favor by way of estoppel to prevent circuity of action, for he could maintain no action on that covenant. Nor could it so operate in any other mode, unless there had been found some allegation in the deed, by which the releasor had asserted some matter to be true, which he must necessarily contradict, and deny to have been true, if he would claim to be the owner of the land. In such case he would have been estopped, because the law will not permit one, who has in such a solemn manner admitted a matter to be true, to allege it to be false. "This," says Kent, "is the reason and foundation of the doctrine of estoppels:" 4 Kent's Com. 261, note d; where he also says, "a release or other deed, when the releasor or grantor has no right at the time, passes nothing, and will not carry a title subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel, and not otherwise." The covenant of non-claim asserts nothing respecting the past or the present. It is only an engagement respecting future conduct.

One, who acquires no title by a release without covenants respecting the title, cannot recover back the purchase-money which he paid for it: *Emerson v. The County of Washington*, 9 Greenl. 88. To permit him to acquire a title subsequently purchased by his releasor, would often enable him to obtain in

another and less direct mode property of more value than the purchase-money.

The conclusion is that the doctrine asserted in the case of *Fairbanks v. Williamson* cannot, upon sound principles be admitted, and that the decided cases in this and other States are opposed to it.

When *Jellison* made his deed of release to the demandant, he was in possession in submission to the title of *Ward*, and was but a tenant at will to him. Not being seised of a fee simple he could not convey it. The demandant must have known, when he received that deed, that *Jellison* had no title and could convey none, for he, at the same time, took an assignment of *Jellison's* contract, to purchase that land of *Ward*. He subsequently acted as an appraiser to make a levy and to pass the title to a part of that land, from a grantee of *Jellison* to a creditor of that grantee. There is no allegation in the deed of *Jellison* to the demandant respecting the title, which it would be necessary for *Jellison* or his grantee to deny or contradict by setting up a title subsequently acquired.

Demandant non-suit.

*Tefft v. Munson*, 57 N. Y. 97; *White v. Patten*, 24 Pick. 324; *Knight v. Thayer*, 125 Mass. 25; *Huzzey v. Heffernan*, 143 Mass. 232; *Gregory v. Peoples*, 80 Va. 355; *Robinson v. Douthit*, 64 Tex. 101; *Carson v. New Bellevue Cem. Co.*, 104 Pa. St. 575; *Perkins v. Coleman*, 90 Ky. 611; *Edwards v. Hillier*, 13 S. Rep. 692; 70 Miss. 803; *Morris v. Jansen*, 58 N. W. Rep. 365; *Duchess of Kingston's Case*, 3 Smith L. C. 2107.

Such title vests in the grantee without his consent: *Baxter v. Bradbury*, 20 Me. 260-3.

**So where a deed imports to convey a fee, though it lack a covenant of warranty, the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire.**

PENDILL *v.* AGRICULTURAL SOCIETY.

Supreme Court of Michigan, 1893.

95 Mich. 491.

HOOKER, C. J. Plaintiffs brought ejectment, claiming title in fee to the premises described in their declaration, and proved

a perfect title from the federal government. The defenses made are :

1. That plaintiffs are estopped from asserting their title against defendant.

2. That defendant has acquired title by adverse possession.

The ancestor of plaintiff Pendill, one James P. Pendill, was the owner of a tax title covering the land in controversy, upon which an auditor-general's deed had issued to him. After his death plaintiff Pendill and the other heirs and the widow of the decedent joined in a partition deed reading as follows, viz. :

"This indenture, made . . . between Frank Pendill [and the other heirs], who are the sons and heirs-at-law of James P. Pendill, deceased, . . . witnesseth :

"That the said parties, as such heirs-at-law and widow, have by amicable arrangement divided among themselves the property of said estate. . . .

"Now, therefore, in order to carry into effect the said agreement and division, the said parties, in consideration of the sum of one dollar to each in hand paid, the receipt whereof is hereby confessed and acknowledged, have granted, sold, and conveyed all their right, title, and interest in and to the following described land (here follow descriptions of land conveyed to the several parties).

"To have and to hold to each of said grantees the lands above described, as conveyed and set off to them in severalty, and to their heirs and assigns forever."

It is defendant's theory that, under this partition deed, any title to the premises subsequently acquired by Frank P. Pendill inured to the benefit of the grantee named in that deed, James Pendill, and through him to defendant. In the case of *Jackson v. Waldron*, 13 Wend, 178, it is said that—

"The principle of an estoppel, as applicable to deeds, is to 'prevent circuitry of action, and to compel parties to perform their contracts.' Thus, a party asserting in a deed the existence of a particular fact, and thereby inducing another to



contract with him, cannot by a denial of that fact compel the other party to seek redress against his bad faith by suit."

This doctrine is well supported. So, where the deed imports to convey a fee, though it lack a covenant of warranty, the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire.

In the case of *Van Rensselaer v. Kearney*, 11 How. 325, it is said by Mr. Justice NELSON that—

"The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterward denying that he was so seised and possessed at the time he made the conveyance."

We may then inquire whether the partition deed relied on carries on its face, by way of recital or averment, the statement that the grantors or their ancestor was seised of a title in fee in the premises, either in express terms or by necessary implication. After naming the parties, the deed recites the fact that they "have by amicable arrangement divided among themselves the property of the estate." The consideration is "one dollar to each," for which they "have granted, sold, and conveyed all their right, title, and interest" in the land mentioned. If there is an assertion of any particular interest or title, either express or by necessary implication, it is limited to that belonging to the estate, of which it may be presumed that all were equally cognizant. We see no opportunity for the application of the doctrine of estoppel to this case.

The question of adverse possession remains. Defendant purchased the premises from James Pendill, to whom this tax title was conveyed by the partition deed. Defendant claimed that it and its grantors had been in possession, claiming under

this tax deed, for upwards of ten years before this action was brought. The Court instructed the jury that the evidence established such claim, and directed a verdict for defendant. The question, then, is, was the Court justified in holding, as a matter of law, that the facts shown constituted adverse possession, instead of submitting the question to the jury?

In the case of *Yelverton v. Steele*, 40 Mich. 541, Mr. Justice GRAVES, in stating the law upon the subject of adverse possession, said: "The doctrine which sanctions the divestiture of the true owner by hostile occupancy is to be taken strictly, and the case is not to be made out by inference, but by clear and cogent proof"—supporting his opinion by numerous authorities. He quotes with approval the language of Mr. Justice DUNCAN where he says that "it must be an actual, continued, visible, notorious, distinct, and hostile possession." While it would have been the duty of the Court to direct a verdict for the plaintiffs in case of the absence of clear and cogent proof upon any one of these six requisites, he could not properly direct a verdict for the defendant unless each and every one of them was established by such proof, uncontroverted; for, the moment that any evidence fairly tending to disprove one of them was given, a question of fact for the jury arose, whether it was shown by plaintiffs or appeared from the examination of defendant's witnesses.

The partition deed was executed August 3, 1885, at which time James Pendill succeeded to the tax title of his ancestor. He was called upon rebuttal, and testified as follows:

"Q. You made your contract with Maynard in the summer of 1886—July or June, 1886. What do you say with respect to your drawing rent, or there being anybody in occupation of the property, up to that time?

"A. I am certain it ceased before that time."

On cross-examination the same witness was questioned and answered as follows:

"Q. The slaughter-house he [meaning the ancestor] had there was occupied by him, was it not, up to the time of his death?

"A. Not all the time, sir.

"Q. I mean he had something there, he kept something there, and looked after it.

"A. I don't think—not at that time—he had anything there before it burned.

"Q. I mean up as long as he lived. Didn't he have some tools?

"A. I don't believe anything was ever kept there for some time. We had no use for it.

"Q. He still retained charge of it, and looked after the property, I suppose, did he not?

"A. In what way?

"Q. Well, looked after it to see there was no trespasses committed on it.

"A. I don't believe he had been there for some years.

"Q. Don't you think he was out there the season before he died?

"A. No, sir; I don't think he had any occasion to go there.

"Q. He had tenants living in the house?

"A. I don't think he did at that time.

"Q. Do you know about it?

"A. Well, I can't state positively just when they came and went, but I know the house was vacant a large part of the time."

Again, the witness Prentice, who went in 1881 to look at the old house with a view to using it as a pest-house, says that he found the house unoccupied, windows out, the doors down, and the floor about used up.

All this was evidence bearing on the question of whether there was actual or visible or notorious or continued occupancy; and though the Court may perhaps properly have felt that the great preponderance of evidence showed the possession claimed, in which opinion the jurors might have concurred, it was their province to deal with the question, which could not properly be taken from them. We see no

alternative but to reverse the judgment, with costs, and award a new trial.

Ordered accordingly.

*Van Rensselaer v. Kearney*, 11 How. 325; *Bush v. Cooper's Add.*, 18 How. 82; *Carver v. Astor*, 4 Pet. 1-84.

### Sheriff's Sale.

**After-acquired title does not inure to a purchaser at a sheriff's sale, as the creditor in such case makes neither a warranty nor its equivalent.**

### HENDERSON v. OVERTON.

Supreme Court of Tennessee, 1830.

2 Yerger, 394.

CATRON, J. In 1798, Overton caused an attachment to issue against the estate of David Allison, which was levied upon land. At this stage of the proceeding Allison died. A *sci. fa.* was run to bring in William Blount as executor of Allison. Blount made no defense, and judgment was rendered against him by default, and Overton recovered against him the sum claimed. At the next term an order was made by the Sumner County Court, where the proceedings were had, that a *sci. fa.* should issue against the heirs of David Allison, to show cause why judgment should not be entered up against them for the amount recovered by the judgment against the executor. No heirs were named in the writ. This, and a succeeding *sci. fa.*, were returned "not found." A judgment was then rendered against the heirs of David Allison "*according to sci. fa.*" Various executions issued upon this judgment; the first in 1801, and levies and sales were made by virtue thereof.

In the fall of 1819, Overton caused an execution to be delivered to the sheriff of Stuart County, grounded upon this judgment, and caused it to be levied upon a tract of land of one thousand acres, lying within said county. The land was advertised and sold to complainants for \$240, and a deed was made to them in the usual form by the sheriff.

In 1822 a compromise took place between Overton, Andrew Jackson, and others, in reference to claims Jackson and Overton had against the estate of David Allison, and the one thousand acre tract of land was by Jackson conveyed to Overton. Upon this title Overton brought ejectment against the complainants and obtained a verdict and judgment for the land. To enjoin this, the bill was filed and an injunction awarded to stay the execution of the writ of possession, which was made perpetual by decree on the final hearing before the chancellor, from which there was an appeal prosecuted to this Court.

It is contended for complainants that Overton having induced them to purchase at the sheriff's sale, is estopped to set up his subsequently acquired deed.

Overton, neither by himself, or through his agent, made any representations to complainants as to the state of the title. The facts seem to be, that Samuel R. Overton, a relation of defendant, transacted the business, and that his object was to buy in the lands of Allison's heirs, at a great sacrifice, upon speculation; that the complainants attended the sale, and bid from similar motives, each risking the title, acting in opposition to each other, and being unacquainted.

Where one man stands by and knowingly permits another to purchase and expend money on land, under an erroneous opinion of title, without making his claim known, he shall not afterward be permitted to exercise his legal right against such deceived purchaser: 2 Atk. 86; 1 Eq. Ca. Ab. 356; Prec. in Ch. 37; 2 Ver. 150; 3 Atk. 692; 5 Ves. 688; 7 Ves. 230; 1 Johns. Ch. R. 344, 354.

Overton had no title at the time of the sheriff's sale, and was endeavoring to obtain it, for which purpose his agent bid up the land to nearly the price of complainant's bid. It is impossible to apply the principle to Overton. To a party situated as Jackson was, alone can the doctrine be made to apply, and in reference to him even it would be inapplicable. Any man's title could be defeated if a purchaser at execution sale could say to the legal owner, ignorant or conusant of the pre-

tended purchase, "You passively stood by and permitted me to be deceived." *Caveat emptor* is the undoubted rule in relation to titles in cases of execution sales of land; there is no warranty of title, either express or implied, by any one: 1 Ten. R. 286; 4 Hayw. R. 179; 2 Bay's Rep. 171; 2 Murphy's N. C. Rep. 291; 1 Devereux & Badger's R. 39; 2 Bibb's R. 95; Martin's R. 575, 615.

It is next contended the rule applies to Overton, "that where A. sells land to B., and executes a conveyance purporting to be in fee with warranty of title, when A. has no estate, but afterward has conveyed to him the fee, the benefit of this conveyance shall inure to B. the purchaser: 1 Inst., §§ 446, 265, a and b; Litt., § 476; 10 Viner's Ab. 483; 1 Salk. 275, 6; 2 Salk. 685; 4 Com. D. Estoppel A. 2; 1 Johns. Ca. 90; 4 Johns. R. 194; 12 Johns. R. 201; 13 Johns. R. 316.

The Courts of New York seem to treat this as an estoppel, proceeding upon the ground that the grantor is not permitted to gainsay his own deed by alleging he had no title at the time he conveyed. All estoppels proceed upon this, that in the nature of evidence, some is of too high a grade to be denied. A fact admitted by recital, or directly in a covenant or deed, concludes all the parties to it, and cannot be averred against: Com. D. Estoppel, A. 2.

We doubt whether this be the true reason, however, why, if A. conveys to B., with warranty of title when he had none, and afterward by conveyance acquires the fee from C., the benefit of the latter deed shall inure to B. Coke gives the better reason in his commentary on the 265th section of Littleton. When speaking of the release, he says: "If there is a warranty of title in the deed from A. to B., by force of which were B. evicted, he could recover from A. in damages to the value of the land, then A. and his heirs would be rebutted and barred of any remedy by action upon the newly acquired deed. And this, to avoid circuity of action, which is not favored in law."

But if there was no warranty of title to sustain the action of covenant upon eviction, the action of A. upon the newly

acquired title would not be barred: Litt., § 265; 14 Johns. R. 194. We have seen a sheriff's deed is a conveyance of the debtor's *legal* title, without warranty express or implied on the part of the debtor, creditor, or sheriff; therefore this incident of *express* warranty does not apply to it in law: 4 Hay. 179; 2 Bay's R. 171; 2 Com. Rep. 188. Had Overton made a deed similar in effect, say a release void in law to complainants, he would not have been barred to set up and prosecute an ejectment upon the deed subsequently obtained from Jackson. Neither could he have been restrained in equity. 'We take it to be a settled rule, unless there has been fraud in the transaction, that where the grantee takes no covenant for title, he is without remedy at law or in equity. Mr. Sugden has brought together the authorities in his treatise on Vendors, 346, 7, 3d ed.; as has Judge KENT: 2 Cain's R. 188; 3 Ves. R. 235.

As an assurance of title, a sheriff's deed stands lower than any other, and equity can afford no relief: 4 Hay. 179; 2 Bay, 170; 2 Murphy, N. C. R. 291.

Equity follows the law. Where there is no legal liability, equity can create none: *Head v. Stamford*, 3 P. Wms. 409. It follows that a contract imposing no legal obligation can be enforced nowhere: *Rutherford v. Wheaton*, Nashville, 1830.

No legal liability was imposed upon Overton by the sheriff's deed to protect the title of complainants, express or implied. They purchased such title as Allison's heirs had, running all risks of its validity: 2 Bay's Rep. 171. The heirs had no title, the deed operated nothing, is void in law, and equity cannot help it; to do so, would be affording protection to a mere nullity, which cannot be done at law or in equity: Litt. 265 a; 2 Bibb's Rep. 95.

This position is undeniable, and covers the whole case so far as protection is sought against the ejectment.

To decree a perpetual injunction in this cause would, in substance, be a decree of specific performance. The complainants paid something like one-tenth of the value of this land; and to decree it to them, would in effect be, in that proportion, a

greater fraud upon the owner than he would commit upon them by retaining their money. Neither the one or the other can be tolerated in a Court of Equity; the greater principle governing which is equality: Fran. Maxm. 3.

It has been contended for the defendant, and admitted to be true by complainants' counsel, "that if the land cannot be obtained by perpetual injunction, the purchase-money cannot be decreed to complainants." This is certainly true, in reference to the purchase of a defective *title*, because as to the *title*, the rule *caveat emptor* applies; but it is just as untrue in reference to the *void judgment* of the execution creditor. Suppose Overton had obtained from the clerk of some Court, other than Sumner, an execution not authorized by any judgment, the writ had been fair on its face; the sheriff had levied it, and obtained \$240, by virtue thereof, from complainants, which sum he had paid over to Overton. Will any one doubt that it could not have been recovered from him, because obtained by a false token? How does the present case differ from the one supposed? In no wise, other than there was an appearance of a judgment upon the records of the Sumner County Court, which exempted the clerk and the plaintiff in the action from the charge of fraud for issuing the execution. 1. No plea of fully administered was found for the executor. 2. The heirs were not named in the writ of *scire facias*, or their names returned by the sheriff. 3. They were not served or the fact of non-residence returned. For these and other reasons the proceedings are void: *Roberts v. Busby and Wife*, 3 Hay. Rep. 299; *Sewell and Jones v. Williams*, 5 Hay. Rep. 280. Same case in this Court in manuscript: *Boyd v. Armstrong*, and *Peck v. Wheaton*.

If A. obtains money from B., without consideration, either through fraud or mistake, B. can recover it back: Bul. N. P. 131; Esp. N. P. 2 to 6; 6 Term Rep. 606. In such cases the action of assumpsit was substituted for a bill in equity, as late as the days of Lord MANSFIELD. The defendant having answered and come to a hearing, cannot then object to the jurisdiction of a Court of Equity when the matter is doubtful: 2 Johns.



C. C. 369 ; 4 Johns. C. C. 290. Courts of Equity in this State have assumed jurisdiction and afforded relief in similar cases : *Robertson v. England* at Sparta, *Ward and Others v. Southerland* and *M'Campbell*, Peck's Rep. Appendix. In these cases an execution on a void judgment had been put into the hands of the sheriff of White, and money obtained upon it; the only question the Court laid stress upon was, is the judgment void? Judge HAYWOOD thought where the judgment had been obtained in the lifetime of the ancestor, the creditor could reach the lands descended, without any administrator being appointed, but felt himself bound by the case of *Boyd v. Armstrong*, decided otherwise by a majority of the Supreme Court.

Overton will refund to complainants \$240, with interest thereon from the 6th day of November, 1819.

It is said defendant did not receive from the sheriff the whole amount. It is his misfortune; had he let his void judgment rest, it would not have happened. The whole proceeding on the execution being void, the sheriff will be authorized to pay the overplus to the defendant; and the decree will order that he may apply and receive it.

The decree below is entirely reversed; therefore, the complainants will pay the costs of the cause in this Court, and the defendant of the Court below.

The bill, so far as it enjoins the action of ejectment, will be dismissed.

Decree accordingly.

*Willis v. Watson*, 5 Ill. 64; *King v. Gilson's Admx.*, 32 Ill. 353.

### *In Pais.*

#### SUMNER v. SEATON.

Court of Chancery, New Jersey, 1890.

47 N. J. Eq. 103; 19 Atl. Rep. 884.

One Mrs. Smith and defendant owned lands in severalty which met in the centre of a street. The city so changed the line of the street that a narrow strip of defendant's land, formerly in the street, was left on the opposite

side and adjoining Mrs. Smith's lots. Afterward Mrs. Smith conveyed her land to the claimant in this suit, who erected a valuable dwelling on the same, honestly supposing that she procured title to all the land as far as the street. She graded the grounds, including the strip, sodded the same, planted trees and shrubbery along the line of the street on the strip, and also erected thereon an iron fence, and otherwise beautified and adorned it. Defendant's deed was on record, and he stood by, seeing all these improvements, but did not assert his title until all the improvements were made, when he brought an action in ejectment, and this claimant commenced this suit in equity to enjoin him from proceeding further in that action.

PITNEY, V. C. Complainant rested her right to relief on three grounds: First, that the effect of the proceedings to change the location of the street was to vest in her the absolute legal title to the strip in question; second, that if the effect was not to change the title at law, it did in equity; and, third, that the defendant is estopped by his silence and acquiescence, while complainant was making her improvements, from setting up his title as against her.

As to the first point. Should the complainant satisfy the Court that it is well taken, the result would be simply to oust the jurisdiction of the Court, for the simple reason that the ground is available at law as a defense to an action of ejectment. The proceeding here is and must be on the basis that the legal title is in the defendant; and as there has been a general verdict rendered by a Judge without a jury, in favor of the defendant herein, and judgment entered thereon, it must have been upon a finding that the legal title is in him.

The second point presents a more serious question. Mrs. Smith owned a lot with 500 feet of frontage on a street in the city of Elizabeth. As so situated, it was admitted that it had great value. The City Council changed the location of the street in front of it in such a manner as to cut off access from this lot to the street by interposing in front of it land belonging to a third party. That such a change must result in a serious injury to the value of the lot is obvious; yet not only were no damages awarded to Mrs. Smith, but a commission actually assessed a large sum against her for benefits conferred upon her lot, and when the feature in question was called to the

attention of the municipal authorities they refused to abate it. Complainant urges, and I think rightly, that the action of the commission and the Common Council can be accounted for, consistently with the least intention on their part to act fairly and justly toward Mrs. Smith, only on the ground that they supposed that the effect of the proceeding was to vest in her the beneficial use of the intervening strip. It is impossible to suppose that five gentlemen, chosen on account of their intelligence, good judgment, and honesty, would make such an award on any other basis, or that an impartial city council would confirm it. These officials cannot be supposed to have been ignorant of the true situation of the property lines, for not only was their attention called to it by the written protest of Mr. Smith, but the map shows it most clearly. For these reasons I think it must be assumed that the whole proceedings, as well the ascertainment of damages as the assessment on account of benefits, must have proceeded on the basis or assumption that the strip in question would become the property of Mrs. Smith. The effect of this assumption is obvious. The sum total or aggregate of the cost of improvement was reduced by the amount which the city would have been obliged to pay, if anything, to Mrs. Smith for damages to her lot caused by cutting it off from the street; and the amount to be assessed against the other lots, not situated in this respect the same as hers, was reduced by the amount actually assessed against her lot, and paid by her. Presumably, then, every other person liable to assessment derived a direct pecuniary benefit from the assumption in question; and there is, to my mind, great force in the argument that all the land-owners who participated in the fruits of this assumption became parties, so to speak, to the arrangement, and are estopped from setting up the contrary of the assumption upon which it was based, and from which they received a direct benefit.

But the defendant was not mentioned in the assessment on account of benefits, and it was not proved that he had anything to do with it, or that he made any individual arrangement with the Common Council on the assumption before

mentioned. It is not shown that he knew anything of it, or of the commissioners' last assessment. And I do not at this moment perceive how the Court can presume anything against him in this respect. But counsel for the complainant relies in this connection upon the release executed by the defendant, as above set forth. He argues that it must be read and construed in the light of the actual facts and features of the scheme of improvement, one of which, by the maps and assessments, appeared to be that whatever land the north-side owners might own south of the south line of the new street should go to the owners on that side, and that such features clearly appeared by the inspection of the map on file in the proper department of the municipal government; and he argues that the land so, in effect, attempted to be transferred from the defendant to the complainant's grantor, is fairly included in and covered by the language of the release, as "land and real estate taken and appropriated by the city for the straightening of Rahway Avenue." In this connection it is important to observe that the payment was made to defendant, and the release in question executed by him in July, 1875, long after the strip in question had been fenced in and inclosed by complainant's grantor, and her improvements in part made, so that defendant, when he executed the release and accepted the money, must have known by observation just what the effect of the improvement was, and that the complainant supposed that she owned this land, and was acting on that supposition. The power of a municipal corporation, in the absence of objection, to acquire land and transfer it to a natural person as a part of a scheme of legitimate improvement, is sustained by judicial decision: *Embury v. Conner*, 3 N. Y. 511; *Sherman v. McKeon*, 38 N. Y. 266.

But I have not found it necessary to determine definitely whether, upon the second ground alone, complainant is entitled to succeed in this Court. This part of the case, however, has, in my judgment, an important bearing on complainant's third position; since I think the circumstances referred to fully justified Mrs. Smith and her daughter, the

complainant, in supposing and believing that the effect of the improvement was to give her the beneficial title to the strip in question, and that she and her assignee, the complainant, acted in good faith on that assumption. In answer to this inference, defendant contended that the protest of Mrs. Smith's husband, above set forth, shows that she had notice of the fact that defendant had the legal title to the land in dispute. But on that point it is to be observed—First, that the land here in dispute was marked on the map as belonging to Wetmore, who was a party, so to speak, to the assessment, and bound thereby; second, that Mrs. Smith's son, who prepared the protest, swears that his mother knew nothing of it; third, that he concluded, upon consideration, that the effect of the proceeding was to vest the beneficial title in the strip in his mother, and so paid the assessment without further question; fourth, that the complainant is not chargeable with knowledge of the protest, and she and her husband deny all notice of any defect of title.

This brings us to the third ground, namely, estoppel by acquiescence and silence. Here complainant relies upon the familiar maxim that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent; or, as it is otherwise expressed, *qui tacet, consentire videtur; qui potest et debet vetare jubet si non vetat*. In *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, Chancellor KENT, at page 354, says: "There is no principle better established in this Court, nor one founded on more solid foundations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." This doctrine was approved by Chancellor PENNINGTON in *Ross v. Railroad Co.*, 2 N. J. Eq. 422, at page 434; by the Court of

Appeals in *Doughty v. Doughty*, 7 N. J. Eq. 643, at page 650 ; and has since been recognized in many cases in this Court, and was acted upon by Chief Justice BEASLEY, sitting for the Chancellor, in *Erie Ry. Co. v. Delaware, L. & W. R. R. Co.*, 21 N. J. Eq. 283, at page 288 *et seq.*, and by Vice-Chancellor BIRD in *Swayze v. Carter*, 41 N. J. Eq. 231, 3 Atl. Rep. 706.

The only question that has ever been raised as to the value of the maxim is that its application to particular cases is sometimes difficult and embarrassing, and requires great care and discrimination : see *Philhower v. Todd*, 11 N. J. Eq. 312, at page 315. But this may be said of all the fundamental maxims and principles of equity, and must not deter the equity Judge from applying them where properly applicable. Several canons have been suggested by the Judges as guides in this work, but, in construing them, we must not lose sight of the facts in the particular case in which they have been enunciated, and must interpret them accordingly. Lord CRANWORTH, in the House of Lords, in *Ramsden v. Dyson*, L. R. 1 H. L. 129, at page 141, after stating the principle with great clearness, says that, in order that the maxim shall be applicable to a case of this sort, viz., the estoppel by expenditure of money on land, it must have three features—First, the person expending the money must honestly suppose himself to be the owner of the land ; and, secondly, the real owner, who encourages the expenditure by his silence, must know that the land belongs to him, and not to the other ; and, thirdly, that the other is acting on an erroneous belief as to its ownership. The canon was applied by Chancellor RUNYON in *Kirchner v. Miller*, 39 N. J. Eq. 355.

With regard to the first of these requisites, I have already shown that Mrs. Smith and her grantee, the complainant, were fully justified in supposing, and did actually suppose, that the land belonged to them. But counsel for the defendant insisted that both Mrs. Smith and complainant are chargeable with notice of the record title of defendant, and argued that they had no right in the face of it to suppose that they had title. I cannot accede to this argument. In the first place, I

do not understand that the strength of complainant's proposition depends at all upon her want of knowledge that defendant held the legal title to this land. If she be chargeable with full knowledge of all the record discloses in that respect, still the question remains, Were not she and her mother justified in supposing that this strip, reclaimed, so to speak, by the municipal action from an ancient highway, became, in some way, and as a result of those proceedings, her property? But if the case were wanting in that element, still I do not think defendant's position tenable. Courts of Equity have in many cases given parties the benefit of an honest supposition as to title, where the slightest examination of the record or other equally available source of information would have disclosed their error. In fact, to exclude the application of the maxim from cases where the party has implied or constructive notice of title from the record, would confine its application to a very narrow field. Absence of notice, both actual and constructive, of the adverse title, would, in many cases, give the party the benefit of the plea of *bona fide* purchaser without notice, and dispense with the necessity of setting up estoppel *in pais*. Chancellor ZABRISKIE in *Dellett v. Kemble*, 23 N. J. Eq. 58, held a party entitled to equitable aid against a judgment creditor of his grantor where the judgment creditor had stood by, and, without notice, permitted the former to build on the property in the honest belief that it was free from incumbrance, when he could have discovered the judgment by a search. In *Town v. Needham*, 3 Paige, 545, the title of Harvey, one of the defendants, to an undivided one-fourth of the premises at the death of his grandmother, clearly appeared by the will of the former owner, which was a part of complainant's chain of title; but he was granted relief against Harvey, on the ground that he bought and made improvements in the honest supposition that the other tenants in common, through whom he derived title, had in some way acquired and were the owners of the whole title. So in *Brown v. Bowen*, 30 N. Y. 620, the title, which was barred by estoppel, was found on the public record. In *Storrs v. Barker*, 6 Johns. Ch. 166, the plaintiff claimed under

the devise of a married woman to her husband, and was chargeable with the knowledge that it was void; and it was held that he was justified in supposing that the title had been validated by some action between the devisee and the heir-at-law, and the heir-at-law, having stood by and encouraged the purchase by plaintiff from the devisee, was held estopped. In *Chapman v. Chapman*, 59 Pa. St. 214, where the plaintiff held under a long lease, and the defendants held in severalty parcels of the whole tract under subsequent conveyances from the same original owner, and plaintiff was held estopped from setting up his lease by his positive encouragement as to defendant Chapman, and by his mere silence as to defendant Gansamer, I infer that plaintiff's lease was a matter of record; since, if not recorded, defendants could have pleaded that they were *bona fide* purchasers for value without notice, and need not have relied upon the estoppel.

The position that, in general, record notice of the title is sufficient to defeat the estoppel, where it rests on mere silence, receives qualified support from Prof. Pomeroy in his treatise on Equity Jurisprudence, § 810; and also from Mr. Bigelow in his last edition of his treatise on Estoppel, 594. I have examined the cases cited by these authors in support of the text, and they are all distinguishable from the case in hand. They each lack one of its important features, viz., that the person sought to be estopped by his silence knew, or had reason to suppose, that the person asking the protection of the estoppel was acting in good faith, on an erroneous supposition as to the title. In *Fisher v. Mossman*, 11 Ohio St. 42, the contest was between a mortgagee and the purchaser of the equity of redemption at sheriff's sale under execution against the owner of the equity. The mortgagee was present at the sheriff's sale, and did not give notice of his mortgage, which was recorded, and it was held that he was not estopped by his silence, in the absence of any notice or reason to suppose that the purchaser was ignorant of the existence of his mortgage. In *Knouff v. Thompson*, 16 Pa. St. 357, it appeared affirmatively that the defendant knew of plaintiff's claim, and that



his own title was defective, and, moreover, the improvements made were of very slight value. In *Hill v. Epley*, 31 Pa. St. 331, the contest was between one tenant in common and the purchaser at sheriff's sale of the interest of the other tenant in common, under judgment and execution against him. The matter relied upon in estoppel by the purchaser at sheriff's sale was that the grantor of the party now claiming against him had been present at the sheriff's sale, and had failed to give notice of his title. When the case was first before the Court in 7 Watts, 163, the opinion and decision was favorable to the purchaser at sheriff's sale, and the remarks of the Court and citation of authorities found on page 168 in support of the estoppel are valuable. On a retrial a verdict was rendered in accordance with this opinion in favor of the purchaser at sheriff's sale, and against the owner of the outstanding half interest, and judgment thereon was reversed by the Court in *banc*, in an opinion by STRONG, J. On page 334, 31 Pa. St., he says: "It seems also to be well settled that silence in some cases will estop a party against speaking afterward. Thus, if one suffers another to purchase and expend money upon a tract of land, and knows that that other has a mistaken opinion respecting the title to it, and does not make known his claim, he shall not afterward be permitted to set up a claim to that land against the purchaser. His silence then becomes a fraud. But silence, without such knowledge, works no estoppel. It is only when silence becomes a fraud that it postpones." And again (page 335): "Clearly, if David Witherow [the plaintiff's grantor and one of the tenants in common] had not attended the sheriff's sale, nothing would have been required of him, after he had his deed upon record. This is conceded. But, if it be admitted that his presence at the sale imposed upon him the duty of giving other notice than that which his recorded deed furnished, and which was consequently known to Epley, it must be because he saw that the purchaser was still acting under an erroneous belief that the whole title was somehow in Samuel [the other tenant in common, and defendant in the execution]. Nothing else

could make his silence work a fraud. But how could he see that? And how is such knowledge affirmatively brought home to him? There is no evidence of any such erroneous belief. The land was being sold as the property of Samuel Witherow, it is true. But Samuel had an interest in the land. Neither the execution nor the sheriff nor the crier asserted that that interest amounted to the entire fee simple, or to an estate in severalty. The sheriff had no right to define what the interest was. The writ was just such a one as it would have been if it had been known by every person present at the sale that Samuel Witherow owned but an undivided moiety. It is impossible, under such circumstances, to see how David's silence could be construed into an admission that Samuel owned the whole, because there was no assertion by the writ, by the sheriff, or by any one that he did. It is equally impossible to discover how David could have supposed that Epley was bidding under the impression, for there was nothing to warrant it, and a deed on record showing the contrary, of the contents of which not only the law presumed, but he had a right to presume, every bidder knew. If the sheriff had offered for sale a tract of land belonging to David in severalty, in which Samuel had no interest, the consequences of silence might have been different."

I believe this to be a correct statement of the doctrine, and I conceive that it fully disposes of the attempt to avoid the effect of the silence in this case by an appeal to the record title. The question is not so much what the party setting up the estoppel might or ought to have known or supposed, as what he actually did know or suppose, to the knowledge of the other party. The New York case (*Rubber Co. v. Rothery*, 107 N. Y. 310, 14 N. E. Rep. 269), much relied upon by defendant, is clearly distinguishable. It lacks the feature of the one party acting on the mistaken supposition that he owned the other party's land, and the other party knowing of the mistake. The case was this: Defendants owned both sides of a stream at a certain point. Further down they owned but one side, while the plaintiffs owned the

other side. Defendants built a dam across the stream above on their own land, and dug a race-way from it on their side of the stream, and built works, which, when put in use, resulted in diverting the whole stream, and carrying it down past the plaintiff's land, before it was returned to its natural channel. Plaintiffs saw these works erected, and made no objection. Defendants set their works in motion, and diverted more than half the waters of the stream, and for that diversion plaintiff brought suit. Now, as defendants clearly had the right to divert one-half the water of the stream, and it did not appear that a beneficial use of the work could not be made with the one-half, or that plaintiff had notice of anything of the sort, it is clear that there was nothing in all that plaintiff saw defendants doing to lead plaintiff to suppose either that defendants supposed that they had a right to divert all the water, or that they intended to do so, or must necessarily do so in order to enjoy their works to their full extent; and besides, it does not appear that the defendants supposed that they had a right to divert all the water, or that, as before remarked, the plaintiff knew or supposed that the defendants were acting on that supposition. The case is somewhat in line with *Cooper v. Carlisle*, 17 N. J. Eq. 525, at page 535. In *Kirchner v. Miller*, 39 N. J. Eq. 355, the complainant made a mistake of a few inches in surveying the line between his land and the defendant's, for which mistake the defendant was not responsible, and of which he was not aware until after complainant had built. The defendant could not be guilty of any acquiescence unless he knew that the complainant was building over on his land, which he did not. The case lacks the features mentioned by Lord CRANWORTH. Moreover, the complainant was able to restore himself at a trifling expense, as shown by the opinion. *Brant v. Coal Co.*, 93 U. S. 326, is also clearly distinguishable. There a party, who held a life-estate only, conveyed and took back a purchase-money mortgage which was assigned to the owner of the fee in remainder, who foreclosed. The deed of assignment recited the title truly. Defendant's grantor purchased at the foreclosure sale.

Plaintiff was the owner of the remainder, and at the death of the life-tenant brought suit in equity to restrain mining, etc. Defendant set up estoppel arising out of the foreclosure, and the Court below dismissed the bill on that ground. This decree was reversed on appeal, by a divided Court. Justice FIELD, at page 335, says: "The purchaser was bound to take notice of the title. He was directed to its source by the pleadings in the case. The doctrine of *caveat emptor* applies to all judicial sales of this character; the purchaser takes only the title which the mortgagor possessed. And here, as a matter of fact, he knew that he was obtaining only a life-estate by his purchase. He so stated at the sale, and frequently afterward. There is no evidence that either the complainant or Hector Sinclair ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one respecting the title inconsistent with the fact; but, on the contrary, it is abundantly established by the evidence in the record that from the time they took from the widow the assignment of the bond and mortgage of the Union Potomac Company, in 1854, they always claimed to own seven-eighths of the reversion. The assignment itself recited that the widow had owned, and had sold to that company, a life-interest in the property, and that they had acquired the interest of the heirs." *Brewer v. Railroad Co.*, 5 Metc. 478, was an action of ejectment, where the party was precluded from setting up equitable estoppel. In *Baldwin v. Richman*, 9 N. J. Eq. 394, Baldwin claimed title by conveyance from Benjamin Richman, and was defeated in an action of ejectment by the heirs of Jeremiah, brother of Benjamin. Jeremiah being the sole owner of the fee of the land in question and other lands, but supposing that he owned them as tenant in common with his brother Benjamin, applied to the Orphans' Court for and procured partition, in which the lot in controversy was set off to Benjamin, who entered, and, after the mistake was discovered, conveyed to Richman, who purchased with full notice of the true state of the title. The bill prayed relief against the ejectment.

Chancellor WILLIAMSON dismissed it on two grounds: First (page 398), that the bill "does not allege that Benjamin took possession of the land and improved it under the impression that the land was his own, nor is there any allegation that it was the conduct of Jeremiah that induced him to take possession and make the improvements. From anything that appears in the bill to the contrary, he knew that Jeremiah was acting under a mistake, and took advantage of it." Second (page 399), that there was an allegation in the bill, but no admission or proof, that Benjamin had made improvements or expended moneys on the land, hence no injury was shown. The case is in all its aspects clearly distinguishable from the one in hand. From the numerous modern cases in other jurisdictions in which the maxim has been applied, I cite the following, which seem to have been well considered: *Canal Co. v. King*, 16 Beav. 630, 22 Law J. Ch. 604; *Slocumb v. Railroad Co.*, 57 Iowa, 675, at page 682, 11 N. W. Rep. 641, 644; *Ross v. Thompson*, 78 Ind. 90, 96; *Markham v. O'Connor*, 52 Ga. 198; *Chapman v. Pingree*, 67 Me. 198; *Stone v. Tyree*, 30 W. Va. 687, 5 S. E. Rep. 878; *Allen v. Shaw*, 61 N. H. 95; *Morgan v. Railroad Co.*, 96 U. S. 716.

In the case in hand I find it impossible to suppose that defendant did not understand that the complainant was making her improvements in the complete confidence that she had title to the whole of the lot. It would have been an act of the greatest folly, if not outright insanity, in her to have made the improvements if she had supposed any other person owned the strip in question. The transaction spoke for itself; and, as before remarked, there was no pretense at the hearing that defendant did not so understand. He does indeed swear that he thought "these parties" were better prepared to know how much land he had there than he was. But the context shows that he referred merely to the quantity of his land cut off by the change of street lines, and not to the state of the minds of the "parties" alluded to, as to their right to use and occupy it as their own. He did not swear that he did not suppose that Mrs. Sumner made her improvements in the

honest belief that she had full right to the perpetual use and occupation of the strip in controversy. With regard to the knowledge by the defendant that a part of the land in the old street to which he had the legal title lay to the south of the southerly line of the new street, I find no difficulty. An inspection of the map shows that he must have known it, and, besides, he not only does not deny it on the stand, but distinctly admits it. He swears that he did not know how much he had. In fact, defendant's counsel admitted in his brief that his client knew that he owned some land at the point in question, but did not know the quantity. But defendant's counsel further insists that no equitable estoppel arises in this case, because the dwelling erected by complainant was on her own land, and the actual improvements put on the land in dispute were so trifling in amount and cost as not to create a duty on his part to speak. I cannot accede to the proposition necessarily assumed in this position, viz., that it is necessary that there should be an actual use or occupation of the very land in question by some fixed and permanent structure in order to raise an estoppel. The true ground of equitable estoppel I conceive to be that the party, in reliance upon the existence of a certain state of facts, has so changed his position that he cannot be restored to his former position, and will suffer serious loss if the facts prove to be different from what he supposed them to be; and the estoppel arises against the party who is responsible for his action on such mistaken belief, and it operates to prevent him from asserting the contrary. Now, it is palpable that actual occupation by building on land is not the only use a party may make of it, the deprivation of which would result in serious injury to him. For instance, suppose in this case complainant's lot had been but 100 feet deep and 25 feet wide, and defendant's legal title had extended across the whole front, and to a depth of 10 feet, and complainant had built upon the whole lot, except the 10 feet owned by defendant, leaving that as a front yard to his buildings. It is at once apparent that the assertion of title by the defendant to the 10 feet would have been utterly destructive

of the value of complainant's structure. Now, the difference between the case just supposed and the one in hand is one of degree merely.

Counsel in this connection further relies on the fact that the strip claimed by defendant does not reach across the whole front of complainant's lot, but leaves a space of about 30 feet next to Mrs. Smith's line by which complainant can have access to the street. But that space is covered by the Wetmore title, and it was admitted at the hearing that it had not been transferred to Mrs. Smith or to the complainant, unless such transfer resulted in equity from the proceedings before referred to. So that, if the Wetmore title is enforceable as well as defendant's, complainant is shut up to a mere right of way by necessity across her mother's lot. But admitting that complainant has, after deducting the lot claimed by defendant, a frontage on the street of 30 feet, or one-fifth of the width of her lot, it is palpable that the utility as well as the market value of her property will be very injuriously affected if defendant may take exclusive possession of the piece in dispute; and it is equally clear, as before remarked, that defendant must have perceived and known that complainant was acting on the assumption that she owned this piece, and that she would not have built her house if she had not so supposed. If ever there was a case in which the duty of the party to speak was clear, it seems to me it was this case, and that the language of Lord CRANWORTH in *Ramsden v. Dyson*, *supra*, applies: "A Court of Equity considers that, when the one party saw the mistake into which the other party had fallen, it was his duty to be active and state his adverse title; and that it would be dishonest for him to remain willfully passive on such an occasion in order afterward to profit by the mistake which he might have prevented." For these reasons, I think the complainant is entitled to relief, and it only remains to determine its nature and extent.

Courts of Equity do not, in all cases of this sort, push the estoppel to the extent of passing the equitable title, but in proper cases permit the owner of the legal title to hold posses-

sion upon terms of compensating the party who has innocently made improvements upon the erroneous supposition ; indemnity to the party entitled to the estoppel being in all cases the end aimed at. It was not, however, suggested at the argument or in the briefs of counsel that remedy by compensation in money would be proper in this case ; and it is palpable that it could not. The value of the strip in question for use by itself must be quite insignificant, and the injury to complainant by reason of its exclusive occupation by another is not easily ascertained or measured in dollars and cents. The only mode in which complainant can be fully indemnified is to be protected in the perpetual enjoyment of the land in question, and for that purpose the defendant should be perpetually enjoined from asserting his legal title, and such will be the decree.

To establish a title by estoppel *in pais* the party relying upon it must show :

1. That the party estopped is chargeable with declarations or conduct amounting to admissions inconsistent with what he afterward offers to prove, and respecting facts not equally within the knowledge or reach of both parties : *Western N. Y. & P. R. Co. v. Richards*, 19 Atl. Rep. 931.

2. That he relied and acted upon such admissions, and was deceived thereby : *Malloney v. Horan*, 49 N. Y. 111 ; *De Mill v. Moffat*, 49 Mich. 125-131 ; *Whitacre v. Culver*, 8 Minn. 133.

3. That such admissions were intentionally designed by the party charged therewith to influence and mislead him : *Turner v. Coffin*, 12 Allen, 401 ; *Whitaker v. Williams*, 20 Conn. 104 ; *Copeland v. Copeland*, 28 Me. 529 ; *Henshaw v. Bissell*, 18 Wall. 255-271.

In 18 Wall. 271 it is said : "There must be *some intended deception* in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud."

One may be estopped by his acts done through honest mistake under circumstances amounting to culpable or gross negligence : *Pence v. Arbuckle*, 22 Minn. 417 ; *Coleman v. Pearce*, 26 Minn. 123 ; *Beebe v. Wilkinson*, 30 Minn. 551 ; *Anderson v. Hubble*, 93 Ind. 576 ; *Blair v. Wait*, 69 N. Y. 113 ; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 109.

Other cases hold that in case of mistake of fact or of legal rights, under circumstances *not amounting to negligence*, the mistaken party is bound by his acts, on the ground that when one of two innocent parties must suffer, it should be the one who caused the injury : *Maple v. Kussart*, 53 Pa. St. 348 ; *Peake v. Thomas*, 39 Mich. 590 ; *Rosenthal v. Maybugh*, 33 Ohio St. 155-168.

In this last case a woman sold land, supposing her husband was dead. He afterward appeared, and conveyed his interest without her joining in the deed. After his death she petitioned for dower, and it was held that she was estopped.



Only he whose conduct was intended to be influenced by the admissions can raise the estoppel: *Morgan v. Spangler*, 14 Ohio St. 102; *Mayenborg v. Haynes*, 50 N. Y. 675; *Kinney v. Whiton*, 44 Conn. 262. But compare *Mitchell v. Reed*, 9 Cal. 204.

But if the admissions are general, or made for the purpose of having them repeated to others, then any one knowing of and reasonably acting upon them may claim the estoppel: *Middleton Bank v. Jerome*, 18 Conn. 443.

Silence alone will not estop, except where it amounts to a fraud; but positive acts of encouragement without a fraudulent intent will be a bar: *Maple v. Kussart*, 53 Pa. St. 353; *Beaupland v. McKeen*, 28 Pa. St. 124.

*Dedication*.—A dedication of land to the public, after improvements have been made on the strength of it, cannot be rescinded: *Livermore v. Maquoketa*, 35 Iowa, 360; *Wilder v. City of St. Paul*, 12 Minn. 192.

*Application*.—The principle of estoppel *in pais*, as affecting legal title, will be applied in courts of both law and equity: *Copeland v. Copeland*, 28 Me. 529; *Bell v. Goodnature*, 50 Minn. 417.

*Contra*.—As violating the Statute of Frauds, this principle as affecting legal title is not applied in some Courts of law: *Hayes v. Livingston*, 34 Mich. 383.

Exhaustive note, 3 Smith's Leading Cases (9th ed.), 2060.

### Married Women and Infants.

**Estoppel *in pais* does not, as a general rule, apply to married women and infants, not *sui juris*, on the ground that they cannot do by acts *in pais* what they cannot do by deed.**

#### Married Women.

#### LOWELL v. DANIELS.

Supreme Judicial Court of Massachusetts, 1854.

2 Gray, 161.

One Mrs. Heffrein, while married, conveyed land to one Hooton, her husband not joining, and at the time of the sale she did not disclose her marriage, but antedated her deed and executed it in her former name, as Rachel Smith, for the purpose of deceiving her grantee. Hooton mortgaged the land, and one of the heirs-at-law of Mrs. Heffrein was in possession of the premises when this action by writ of entry was commenced to recover the land by the owner of said mortgage interest.

THOMAS, J. The decision of one of the questions raised by the bill of exceptions seems to be conclusive of the rights of the parties, and to this we have confined our attention. That

question is, whether the tenant, whose wife is heir-at-law of Mrs. Heffrein, is estopped to deny the validity of the deed under which, through the deeds of Hooton, the demandant claims.

The deed of Mrs. Heffrein to Hooton, *proprio vigore*, conveyed no estate. The separate deed of a married woman without the assent of the husband, it was absolutely void : *Fowler v. Shearer*, 7 Mass. 21 ; *Concord Bank v. Bellis*, 10 Cush.

It has no force, because the grantor had no capacity to make it. The instrument has the form and semblance of a deed, and nothing more. Indeed, the demandant does not contend that this deed has of itself any validity ; but that, under the facts of the case, the tenant is estopped to deny its validity ; or, in other words, the title of the demandant is the result of estoppel, and not of grant ; or, to speak perhaps more precisely, of an estoppel that works a grant.

The demandant, to show title in himself, offers the two deeds of mortgage from John B. Hooton. Deeds of warranty, they make *prima facie* evidence of the seisin of the premises in the demandant. The tenant then shows that the premises belonged to Mrs. Smith ; that she died intestate ; that his wife was her daughter and heir-in-law. The tenant thus makes an elder title. The demandant must now show that the estate that was in Mrs. Smith passed out of her and into his grantor. He undertakes to show it passed by deed. To do this, he must prove not merely the execution of the instrument, but its execution by one having the requisite legal capacity to make a deed. He offers for this purpose a copy from the registry, of a deed, purporting to be from Mrs. Smith to his grantor, bearing date August 1, 1834. Assume that this is sufficient *prima facie* evidence of the execution and delivery of the deed at the time of the date ; it is only *prima facie*, and when the evidence is closed, the burden is still on the demandant to show its execution and delivery, by one competent in law for that purpose. When the evidence is in, it appears that this deed was made, delivered, acknowledged, and recorded, when the grantor was a married woman, and incapable of making it ;

that is, that it was absolutely void. By force of the deed, then, the demandant wholly fails to show that the land had passed from the tenant's wife's mother to his grantor.

Then the demandant says that the deed, upon its face, bears date of the 1st of August, 1834, when the grantor was sole and capable of making a deed ; that it was signed with the name she bore before her marriage with Heffrein ; and was so signed and dated with a fraudulent purpose, on her part, of giving the deed an effect, which it would not have had in her true name, and under the true date ; knowing it would deceive and impose upon some person to be affected by it ; and when the agent of the demandant called upon Mrs. Heffrein, stating to her that he wished to examine Hooton's title, and informing her that the application was made with a view to a mortgage, she produced the deeds of the land to herself, but did not communicate to the agent any defect in Hooton's title ; and that, therefore, whether the fraudulent purpose was to deprive her husband of his interest in the estate, or any other, the grantor and her heirs are estopped to deny that the date of the deed, which she executed and caused to be recorded, was the true date ; and as against her and her heirs the deed will be taken to be of the same effect as if it had been executed and delivered at the time of its date, when she was unmarried and had capacity to execute it ; or, in other words, the tenant is, upon these facts, estopped from setting up any title in Mrs. Heffrein at the time Hooton conveyed to the demandant. This we understand to be the view of the case taken by the learned Judge, though perhaps in a critical examination of the language used by him, the silence of the grantor as to the defect of Hooton's title will not be found to be included as an element in the instruction given to the jury.

This raises the material question at issue between the parties, whether a married woman and her heirs may be barred of her estate by an estoppel *in pais*.

She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void ; any covenants in such separate deed would be likewise void. If she were to

covenant that she was sole, was seised in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them, nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith, and for full consideration, cannot affect her interest in the estate, or that of the husband and children. The strongest possible example of this was presented in the case of the Concord Bank *v.* Bellis, above cited, in which it was held that where an estate was conveyed to a married woman, and she at the same time gave back a deed of mortgage to secure a part of the purchase-money, such deed of mortgage was wholly void. And we think a married woman cannot do indirectly what she cannot do directly; cannot do by acts *in pais* what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate.

This doctrine of estoppel *in pais* would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates.

But if Mrs. Heffrein was personally estopped to say this deed was executed by her while under coverture, we are not prepared to say that the daughter would be so estopped. The condition of the estate was this: The fee was in Mrs. Heffrein, with limited power of alienation; with no power indeed to convey, except by the joint deed of herself and husband: Rev. Sts., c. 59, § 2; and with no power to devise it. The law had given her no power by any act of hers to change the destination of the estate, or impair the title which at her decease would vest in her child. Upon her decease, the daughter enters into possession of the estate. She is rightfully there; the estate is in her,

unless there has been an alienation of the estate in the mode prescribed by law, in the lifetime of the mother. If it be said that the mother was guilty of misrepresentation and concealment, for which coverture affords no protection; the answer might well be, that whatever might be the effect upon her personally, even if it estopped her to claim any interest in the estate, it could not do what the statute has not done, give her a power so to alienate the estate as to prevent the entry of her heirs-at-law upon her decease.

Such seems to us the result of the application of well-settled principles of law to the case at bar. And upon a somewhat diligent examination of the authorities, we have found none to lead us to a different conclusion. The diligence of the counsel for the demandant has cited but two cases, having much tendency even to sustain the position that the estate of a married woman, incapable of making a deed, may pass by estoppel *in pais*. These are *Hunsden v. Cheyney*, 2 Vern. 150, and *Savage v. Foster*, 9 Mod. 35.

In both these cases the husband and wife, who jointly were capable of levying a fine, were parties to the original frauds. They were both suits in equity against the parties to the fraud. They both rely, as matter of authority, upon the case of the estoppels of infants, who are not incapable of conveying, but whose deeds are voidable only and not void; and neither of the cases, we think, entitled to the highest consideration. If they establish the point, for which they are cited, that the estate of a married woman may pass by her acts *in pais*, not only without the concurrence of the husband, but in fraud of his rights, we should question their application under our system, where the statute of frauds is equally binding in Courts of Equity as of law; where the powers of married women, in the conveyance or devise of lands, are defined and limited by express statute; and where the titles to real estate are matters of public record.

No case at law has been cited, nor have we found one, in which it has been held that the estate of a party has been barred by estoppel *in pais*, who was incapable of conveying by

deed. And though Courts of law have liberally applied the doctrine of estoppel *in pais* to cases of personal property, in the transfer of which no technical formalities intervene to prevent its application, we know of no case in which it has been applied to a party incapable in law of making a contract.

The result of the views we have felt compelled to take of the case is, that the deed of Mrs. Heffrein to the demandant's grantor was absolutely void, and that this tenant is not estopped to deny its validity.

New trial in this Court.

Concord Bank *v.* Bellis, 10 Cush. 276; Morrison *v.* Wilson, 13 Cal. 494; Glidden *v.* Strupler, 52 Pa. St. 400.

#### Infants.

WIELAND *v.* KOBICK.

Supreme Court of Illinois, 1884.

110 Ill. 16.

Mr. Chief Justice SHELDON : This was an action of ejectment for the recovery of a certain lot of land in an addition to Chicago. There was recovery by the plaintiff, and the defendants appealed.

On the trial in the Court below there was introduced in evidence, in defense, a deed from the plaintiff to Emily C. Cummings, in which it is recited that "Margaretha David, (the plaintiff), unmarried, *and of age*," for \$3,500 conveys and quit-claims to Emily C. Cummings the property in question, and a deed from Emily C. Cummings to Anna C. Haas, one of the defendants. The plaintiff then introduced evidence to prove that at the date of the deed to Emily C. Cummings the plaintiff was a minor, and under the age of eighteen years, and that after coming of age she filed her disaffirmance of the deed, and a demand for possession of the premises, in the recorder's office of Cook County.

It is objected that the evidence is not sufficient to justify a

recovery against all of the defendants, as there is no evidence to connect the three other defendants with Anna C. Haas. Defendants having pleaded the general issue only, it was not necessary, under the statute, for plaintiff to prove that defendants were in possession of the premises, or claimed an interest or title therein: Rev. Stat. 1874, chap. 45, § 22.

The only other question which appellants make upon the record is as to the effect of plaintiff's deed to Emily C. Cummings, whether or not plaintiff was estopped from disaffirming such deed made while she was a minor, she having stated therein that she was of age. The authorities seem abundantly to establish that a defendant is not estopped from setting up infancy as a defense to a contract, by his fraudulent representations that he was of full age: *Merriam v. Cunningham*, 11 Cush. 40; *Studwell v. Shapter*, 54 N. Y. 249; *Gilson v. Spear*, 38 Vt. 311; *Burley v. Russell*, 10 N. H. 184; *Conrad v. Lane*, 26 Minn. 389; *Brown v. McCune*, 5 Sandf. 288. In the latter case the Court said: "We are not aware that any case has gone the length of holding a party *estopped* by anything he has said or done while he was under age, and we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general." And further on: "We are clear that the doctrine of estoppel is inapplicable to infants."

The conclusion, we think, from the authorities, must follow that the statement in the deed of plaintiff that she was of age is not an estoppel to the disaffirmance of it.

The judgment will be affirmed.

Judgment affirmed.

The rule applies when the false statements are not contained in the deed itself: *Conrad v. Lane*, 26 Minn. 389; *Burley v. Russell*, 10 N. H. 184; *Buchanan v. Hubbard*, 96 Ind. 1.

False statements as to ability to pay: *Studwell v. Shapter*, 54 N. Y. 249.

Mere silence when the grantee is known to believe the grantor to be of age: *Baker v. Stone*, 136 Mass. 405; *Rice v. Boyer*, 9 N. E. 420; 108 Ind. 472.

**Exception.**

But estoppel *in pais* does apply to married women, and infants of years of discretion, in cases where their declarations or conduct amount to a tort; as, where they are not parties to the contract or conveyance involved; on the ground that, being liable for their torts, their lands might be subjected to the satisfaction of a judgment thereupon, and by estoppel circuitry of action is prevented.

**Married Women.**

GRAY *v.* CROCKETT.

Supreme Court of Kansas, 1886.

35 Kan. 66, 686; 10 Pac. Rep. 452.

One Long contracted to sell to Gray, this plaintiff, a certain tract of land, the title of which was in Mrs. Long, defendant's wife. When this contract was made and executed Mrs. Long was present; she heard the contract stated, and knew its terms and conditions, and did not dissent therefrom. She did not disclose her own ownership, and the deed by which she acquired title was not of record. Gray supposed that Long was the owner, as he was living on the land. Long refusing to convey the land according to the contract, Gray sues for specific performance thereof. Mrs. Long then asserts her title, and the Court below held that she was not estopped. Hence this appeal.

HORTON, C. J. It is claimed by the plaintiff that the order directing the trial of this cause to be had in Douglas, instead of Wyandotte, County is void, and, if not void, is at least erroneous. The order was based upon the affidavit of H. C. Long, one of the defendants, setting forth "that he was advised by his attorney that Hon. W. R. WAGSTAFF, the district Judge, was a material witness for the defendants upon the trial; that he believed the advice to be true; and that he desired the testimony of the Judge at the trial, and intended to procure the same if a change of venue was granted."

Section 56 of the Civil Code reads:

"In all cases in which it shall be made to appear to the Court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the Judge is interested, or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the Court may, on application of either party,



change the place of trial to some county where such objection does not exist."

The contention is that a district Judge is not "disqualified to sit," even if a material witness in a case, and that the affidavit upon which the order changing the place of trial to Douglas County was made was insufficient, in that it did not set out what the defendants expected to show by the Judge, nor was it otherwise made to clearly appear that the Judge was a material witness.

We do not think the order of the Court void. A Judge is not competent as a witness in a cause tried before him, for this, among other reasons: that he can hardly be deemed capable of impartially deciding upon the admissibility of his own testimony, or of weighing it against that of another. It is now well settled that the same person cannot be both witness and judge in a cause: 1 Greenl. Ev. (12th ed.), § 364; *Ross v. Buhler*, 2 La. (N. S.) 312; 2 Bouv. Law Dict. 12. Therefore we think that where a Judge is a material and necessary witness in a case he is "disqualified to sit." If the District Court had overruled the application to change the place of trial upon the affidavit presented, we would unhesitatingly pronounce the ruling eminently correct, because it seems to us that the true rule in such a case is that such facts and circumstances must be proved by affidavits, or other extrinsic evidence, as clearly show that the Judge is a material and necessary witness, and unless this clearly appears, a reviewing Court will sustain an overruling of the application: *City of Emporia v. Volmer*, 12 Kan. 622. The affidavit in this case for the change of venue should have disclosed how the attorneys obtained knowledge of the fact that the district Judge was a material witness, and all the facts the defendants believed the Judge would prove. This was not done; but, although the affidavit is deficient in this respect, we cannot wholly ignore the personal knowledge of the Judge who transferred the case. A Judge ought not to transfer a case upon a mere suggestion, or even upon an affidavit stating conclusions only, and no change of venue should be granted except for

cause, true in fact and sufficient in law, and all of this should be made to clearly appear to the Court; but when an affidavit is presented in general terms for such a change, and the Judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit, and his own personal knowledge that he is disqualified, cannot be declared erroneous: *City of Emporia v. Volmer, supra*; *Edwards v. Russell*, 21 Wend. 68; *Moses v. Julian*, 45 N. H. 52.

The contract set forth in the petition is as follows:

“APRIL 22, 1881.

“Agreement between H. C. Long and B. Gray for sale of his farm of thirty-three acres, south side of Tauraume Street, Wyandotte, for eight thousand dollars. Said Long agrees to sell the said farm for \$8,000, payable as follows: \$500 by the 28th of April inst.; \$1,500 in three months from date; and balance, \$6,000, in three years, with interest at eight per cent. Gray agrees to make payments as above, and pay Armstrong’s commission, not exceeding \$100. Gray to have possession when \$2,000 is paid, and deed then to be given, and mortgage then given to Long for three years, at eight per cent. interest, with the privilege of paying the whole or part sooner.

“H. C. LONG.

“B. GRAY.”

The principal and the important question involving the merits of this case arises upon the following finding of fact:

“At the time of the making of the written agreement Martha M. Long, wife of H. C. Long, was present, heard the contract stated, knew the terms and conditions thereof, and did not dissent therefrom, excepting she expressed a desire that the deferred payments should draw ten per cent. interest instead of eight per cent., as provided in the contract.”

A further finding of the trial Court is to the effect that Mrs. Long was the owner in fee simple of the real estate in controversy; and, as a conclusion of law, upon all the facts found, the Court decided that Mrs. Long was not estopped from asserting her ownership or title to the same by reason of any

act of hers suffered or done before, at the time, or since the making of the written contract of April 22. At the time of the execution of this contract Long and wife lived upon the land within the city of Wyandotte, and the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, under which Mrs. Long claims title, was unrecorded. It had been delivered to the register of deeds of Wyandotte County for record in the year 1860, but was placed with other deeds in a package, where it remained until found by the register in the fall of 1883. It could only have been found by a person having such knowledge of the business management of the register's office as to induce an investigation of the package containing the same. The written contract shows upon its face that H. C. Long sold the land as his own. It is indisputable that the plaintiff supposed he was dealing with Long as the owner of the land; and that both husband and wife were willing to sell is evident from the fact that they did shortly thereafter sell at an advance. Mrs. Long asserted no title to the premises until after the decision of this Court, in June, 1883, that the land was within the limits of the city of Wyandotte, and therefore that only one acre thereof was exempt as a homestead: *Gray v. Crockett*, 30 Kan. 138; s. c. 1 Pac. Rep. 50. This was more than two years after the execution of the written contract. Upon the belief that Long was the owner of the land, the plaintiff commenced his suit for specific performance of his contract on March 3, 1882. This suit was prosecuted by him for over a year without Mrs. Long making her title known, and the money and time of the plaintiff was expended in his attempt to obtain the conveyance which H. C. Long had agreed to execute. When the case was tried at the July Term of the Court for 1882 it was admitted by all the parties, for the purposes of the trial, that on April 22, 1881, H. C. Long was the owner of the land described in the contract.

Upon the findings of fact, we think Mrs. Long is estopped, in equity, from now asserting that at the time of the contract between the plaintiff and her husband she was the owner of the premises described therein. Questions relative to estoppel

are not, in general, controlled by technical rules, but are usually determined upon principles of equity and good conscience. Mrs. Long stood by and allowed the contract to be executed; to some extent she participated in the negotiations preliminary to the execution of the contract. Her silence as to her title, her acquiescence at the time of the contract, and her failure to disclose her title during the earlier stages of this litigation, invoke against her the familiar rule of justice, that if one stands by and allows another to purchase his property without giving him any notice of his title, a Court of Equity will treat it as fraudulent for the owner to afterward try to assert his title. "He who will not speak when he *should* will not be allowed to speak when he *would*." *Goodin v. Canal Co.*, 18 Ohio St. 169; *Tilton v. Nelson*, 27 Barb. 595; *Foster v. Bigelow*, 24 Iowa, 379; *Anderson v. Armstead*, 69 Ill. 452; *Thompson v. Sanborn*, 11 N. H. 201; *Ford v. Loomis*, 33 Mich. 121; *Beatty v. Sweeney*, 26 Mich. 217; *Dougrey v. Topping*, 4 Paige, 93.

Judge THOMPSON, in an article concerning estoppels against married women, says :

. "If a married woman owns real property, but her title is not of record, and her husband enters into a contract for the sale of it, of which she is informed at the time, and to which she makes no objection, she will be estopped from setting up her title to the land to defeat a suit brought against her husband for specific performance of his contract, and so would her grantee." 8 South. Law Rev. (N. S.) 275-310; *Smith v. Armstrong*, 24 Wis. 446; *Catherwood v. Watson*, 65 Ind. 576.

We are of the opinion, therefore, that the conclusion of law of the trial Judge that Mrs. Long was not estopped from asserting her ownership or title to all the premises in dispute is erroneous, and cannot be sustained.

It is again insisted that defendants are entitled to judgment, even though the homestead included only one acre, as the contract was for the entire tract at a price in gross, and not so much per acre; and as the homestead acre was inalienable by the husband alone, and was in no manner identified in the contract or its price determined, that there is no way of appor-

tioning the price of the thirty-two acres which the husband could sell. In addition to what is stated upon this point in the former opinion of this Court in *Crockett v. Gray*, 31 Kan. 346; s. c. 2 Pac. Rep. 809, it appears to us from the record that H. C. Long and wife have no real complaint to make. Upon the trial the plaintiff offered these defendants the privilege of selecting their own homestead; therefore they will have the right to retain any acre of the land described in the contract which they may choose. The plaintiff only asks that his contract be enforced after these defendants select and retain one acre thereof. As was said by Mr. Justice BREWER, speaking for this Court when the case was last presented to us for our determination: "It is equitable that the contract of April 22, 1881, be enforced so far as is possible, and not that the contracting party be permitted to avoid his contract obligations." When Mrs. Crockett purchased she had notice of the prior sale of the premises to plaintiff, and therefore acted with full knowledge of all his rights: *Meixell v. Kirkpatrick*, 33 Kan. 282; s. c. 6 Pac. Rep. 241. L. H. Wood was the agent for Mrs. Crockett, and when she purchased, on December 24, 1881, she had no actual knowledge of the deed from Long to Vedder of September 30, 1860. This deed was found by Wood in a package in the register's office about September 10, 1883; therefore Mrs. Crockett bought the land with ignorance of the title of Mrs. Long, and, like the plaintiff, supposed she was dealing with Long as the owner. After the first trial of this case Mrs. Crockett became afraid of her title, and desired to sell the land. L. H. Wood then negotiated a sale of it from her to his father-in-law, the latter paying the same price that Mrs. Crockett did, with interest on her money. As all of these sales were made through L. H. Wood, and as he acted as agent both for Mrs. Crockett and his father-in-law, and had notice of all the rights of plaintiff, the latter parties are charged with his knowledge. Wood, and the principals for whom he acted, dealt with the land as that of Long, upon the belief that the contract of April 22, 1881, could be avoided solely because the land described therein was outside of the limits of the

city of Wyandotte, and therefore, being the homestead of H. C. Long and wife, could not be alienated without their joint consent. The attempt to set aside the contract of April 22, 1881, upon the ground that Mrs. Long was then the owner of the premises, is an after-thought, evidently not contemplated when the joint answer of the defendants was filed.

The statute provides that in cases decided by this Court when the facts are found by the Court below, this Court will send a mandate to the Court below directing it to render such judgment in the premises as it should have rendered upon the facts found. Under the statute, therefore, in view of the conclusion obtained, as none of the findings are excepted to by the defendants, the cause must be remanded, with directions to enter judgment for the plaintiff: § 559, Code. Of course the plaintiff is only entitled to the enforcement of the contract of H. C. Long. He did not bargain for or purchase the *supposed inchoate interest* of Mrs. Long. She did not sign the contract, and was not asked to sign the same. The plaintiff is entitled to what his written contract calls for. The decree, however, for the specific performance of the contract, as well on the part of H. C. Long as of Mrs. Crockett, must be so framed as to fully protect such inchoate interest of Mrs. Long, as the wife of H. C. Long, whether owned by herself or, subsequent to the contract, transferred to her co-defendant, Mrs. Crockett. The rights of the plaintiff are the same as though the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, had never been executed, and as though there had been no conveyance subsequent to the contract from H. C. Long to Elizabeth I. Crockett.

The judgment of the District Court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Other cases claim that even if she is not a party to the conveyance she cannot be estopped by matter *in pais*, holding that the only way she can transfer her title is by deed: *Unfried v. Heberer*, 63 Ind. 67; *Behler et ux. v. Weyburn*, 59 Ind. 143.

As to when an infant is liable in tort for his fraud, see *Gilson v. Spear*, 38 Vt. 311.

## Infants.

## BLAKESLEE v. SINCEPAUGH.

Supreme Court of New York, 1893.

71 Hun, 412.

The plaintiff, a minor, owned certain lands, and defendant, thinking they were owned by the minor's grandfather, purchased them of him, being assured by the plaintiff at the time that he had no title or interest whatever in or to the same. Defendant, having paid for the land, went into possession, and plaintiff brings an action of ejectment.

MERWIN, J. Upon the trial of this action it was shown on the part of the plaintiff that Havilla D. Blakeslee, by deeds dated September 25, 1834, and September 22, 1838, became the owner of a quantity of land, and thereafter, by deed dated December 3, 1880, and duly recorded December 4, 1880, he with his wife, conveyed the same to the plaintiff, excepting sixteen acres theretofore conveyed to the plaintiff. The premises in dispute are a part of the lands described in these deeds. The consideration of the deed of December 3, 1880, as stated in the deed, is the sum of one dollar and the maintenance and support of the parties of the first part during their natural lives. It was then shown on the part of the defendant, that Havilla D. Blakeslee and wife, by warranty deed dated December 1, 1882, and recorded December 5, 1882, conveyed the premises in dispute to the defendant for the consideration therein named of \$680, which defendant at the time paid to the grantor or the person acting for him. Havilla D. Blakeslee was the grandfather of plaintiff, and evidence was given tending to show that plaintiff at this time lived with his grandparents, on the farm of which the premises in question were a part; that he knew of the negotiations for the purchase by defendant of the grandfather; that during these negotiations the defendant saw the plaintiff, told him he was talking about buying a piece of land of his grandfather, and had heard that he, the plaintiff, had an interest in it, and asked him whether that was so, and whether he had any deed or mortgage against it;

and he, the plaintiff, replied that he had no deed or mortgage against it, and had no interest in his grandfather's premises ; that the plaintiff at the time knew that he was the legal owner of the property, and made the statement to defendant with intent to deceive him and induce him to buy of the grandfather ; that the defendant thereupon, in reliance upon the truth of plaintiff's statement, and in ignorance of the true state of the title, made the purchase of the grandfather.

The plaintiff denied making the representations or that he knew that his deed covered the property conveyed to defendant. It was also shown that plaintiff was then a minor, having been born March 6, 1862.

At the close of the evidence the counsel for plaintiff asked the Court to direct a verdict for the plaintiff upon several grounds, chiefly that the evidence upon the part of the defendant was not sufficient to constitute an estoppel ; that at the time of the alleged statements the plaintiff was an infant, and that if he made the statements he did not know at the time whether or not he owned the land, and that no fraud was shown upon his part, and that the defendant was guilty of negligence in not causing the records to be searched. The Court denied the motion, and stated that in its opinion the better way to dispose of the case was to submit it to the jury on four questions: "*First*, whether these statements were made by the plaintiff to the defendant ; *second*, whether the plaintiff had knowledge at the time he made them that he was the legal owner of the land ; *third*, whether they were made by the plaintiff with the intention that they should be acted upon by the defendant in the purchase of the land ; *fourth*, whether they were acted upon and relied upon by the defendant when the land was purchased by him." The plaintiff's counsel duly excepted to such ruling and to the denial of the motion. The case was thereupon submitted to the jury upon the line suggested by the Court, and a general verdict rendered for the defendant. There was no exception to the charge and no request that any other question should be submitted to the jury.

1. The first proposition now presented by the plaintiff is that



the plaintiff, being an infant at the time of making the alleged statements, was not estopped thereby.

Assuming, as we must, that the facts, so far as warranted by the evidence, were found against the plaintiff, we have here a case of intentional fraud. In *Spencer v. Carr*, 45 N. Y. 406, where, as here, it was claimed that an infant was barred of her title by an equitable estoppel, it was held that in the absence of intentional fraud upon her part she would not be estopped, and that as that was not found she would not be deprived of her legal rights. The inference is that if there was intentional fraud the doctrine of equitable estoppel would apply notwithstanding infancy. The opinion of the Court in the case strongly supports this inference, in cases where the infants are of sufficient age to appreciate their rights and duties. We are referred to no case in this State where the views suggested in *Spencer v. Carr* are criticised. In *Brumfield v. Boutall*, 24 Hun, 457, the question of fraud on the part of the infant was not up, nor was it in *Sherman v. Wright*, 49 N. Y. 231. The same may be said as to *Ackley v. Dygert*, 33 Barb. 176. In *Brown v. McCune*, 5 Sandf. 224, decided in 1851, it was held that fraudulent representations as to his age did not bind an infant. This case was criticised, and the opposite rule held in *Eckstein v. Frank*, 1 Daly, 334. In *Green v. Green*, 69 N. Y. 553, a father had taken a deed from his minor son and paid him the consideration, and the question was whether the son, on becoming of age, could repudiate the deed without restoring the consideration. It was held that he could, it appearing that the money was spent and he had no other property with which to replace it. There was no question of fraud in the case.

In 1 Story's Equity, § 385, it is said in reference to cases like the present that "cases of this sort are viewed with so much disfavor by Courts of Equity that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation; for neither infants nor *femes covert* are privileged to practice deception or cheats on other innocent persons." In 2 Sugden on Vendors, 8th Am. ed. 507, chap. 23, § 1, pl. 17, it is said: "If a person having a right to an estate

permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert, or under age." In 2 Pomeroy's Equity, § 815, it is said : "An equitable estoppel arising from his (the infant's) conduct may be interposed, with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property or of contract in contravention of his conduct upon which the other party has relied and been induced to act." Numerous cases are cited to each of the quoted propositions. The same rule is stated in Bigelow on Estoppel, 488. See, also, note in 44 Am. Dec. 386 ; Bispham's Eq., § 293.

There is no doubt in the present case that the infant was of sufficient age to appreciate his rights and duties. He lacked only a few months of being of age. The rule to be inferred from the Spencer case, as to the application of the doctrine of equitable estoppel to infants, while it may not be entirely consistent with the supposed disability and need of protection of infants, has, I think, the weight of authority in its favor, and it should be followed by us in this case. The Court below, therefore, properly held that the fact that plaintiff was an infant did not of itself relieve him.

2. The plaintiff further claims that he should not be estopped because he had no knowledge that he owned the land in dispute. This, however, upon the evidence was a question of fact and was found adversely to plaintiff.

3. It is further claimed that the burden of proof is on the defendant, and that the testimony being evenly balanced defendant must fail. It is true that the burden of proof was on the defendant, and that statements testified to by the defendant were denied by the plaintiff. It was, however, for the jury to determine where the truth was, and there were many surrounding circumstances that bore upon the question.

4. It is further claimed that the defendant was guilty of *laches* in neglecting to consult the records in the clerk's office, and the case of Trenton Banking Co. v. Duncan, 86 N. Y. 221, is cited in support of the proposition. In that case the plaintiff, who sought the benefit of an estoppel, neither looked at the

record nor made any inquiry of anybody as to the ownership of the property, and it was held that its failure to examine the record and make inquiry prevented its recovery. The present case is materially different. So in *McCulloch v. Wellington*, 21 Hun, 5, there were no representations by the owner, but, as said in the opinion at page 14, it was the case of a purchaser who, from his confidence in the vendor, or from other circumstances, not imputable to the claimant, has purchased property and omitted to make the necessary and ordinary examination of title. In *Lyon v. Morgan*, 19 N. Y. Supp. 201, the effect of failure to examine the record was not determined, and the case was decided upon other grounds.

If the present case was one where the owner was simply silent, it may be that the constructive notice from the record would prevent the defendant from receiving any benefit from the doctrine of estoppel. But assuming there were false representations and intentional fraud, the rule would be different: *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Fisher v. Mossman*, 11 Ohio St. 47. As said by Judge STRONG in *Hill v. Epley*, 31 Pa. St. 334: "It should never be forgotten that there is a wide difference between silence and encouragement."

"A party setting up an equitable estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth:" 2 Story Eq., 12th ed., § 1553 b. Whether the defendant in that respect was negligent under the circumstances of the present case was a question of fact: *Moore v. Bowman*, 47 N. H. 494. The Court below was, therefore, correct in holding that it should not be said, as matter of law, that the defendant was guilty of negligence.

5. The appellant claims that incompetent testimony was admitted to his prejudice, but we find no ruling that supports this contention.

No other question is presented. It follows that the judgment should be affirmed.

3 Washb. R. P. 77; Bigelow on Est. 602; *Galbraith v. Lunsford*, 9 S. W. Rep. 365; 87 Tenn. 89; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Rice v. Boyer*, 9 N. E. 420, 108 Ind. 472.

**Modern Tendency.**

Many cases hold that estoppel *in pais* applies to married women and infants, whether the fraudulent conduct is in connection with their contracts or independent of them, on the ground that they shall not use the law protecting them as a shield for their frauds.

PATTERSON *v.* LAWRENCE.

Supreme Court of Illinois, 1878.

90 Ill. 174.

Mr. Justice WALKER. In the month of August, 1867, Melvina Brazee was married to one Robert Patterson. On the second day of the following September she obtained a conveyance of lot 9, in block 45, of the original plat of the city of Galesburg. The conveyance was to her by the name of Melvina Brazee, which was her name by a former husband, from whom she was divorced. On the same day she executed, by the same name, a deed of trust to O. F. Price, for the use of N. Brisco, on this lot, to secure the payment of \$600, which sum she paid for the lot. On the 8th of September, 1868, she went to one McChesney, an insurance and loan agent, to procure a loan of money, introducing herself as Mrs. Brazee, saying her property was advertised for sale under the trust deed, and she would lose it unless she could procure \$600. McChesney stated the facts to R. A. Lawrence. Lawrence offered to loan the money to her if she would secure its payment. The title was examined, and found to be in her name as Brazee, and being asked by McChesney if she was a widow, she answered she was. Being satisfied with the title and security, Lawrence loaned the money, and took two notes, of \$300 each, drawing ten per cent. interest, executed by her in the name of Melvina Brazee, and also a trust deed on the lot, in the same name. Failing to pay the interest at the expiration of a year, she requested the loan of \$40, which Lawrence let her have, and took a note for \$100 to cover the interest and this loan, securing the same by a second trust deed, executed in the same manner. Failing to make payment at the

end of the second year, the property was advertised and sold under these trust deeds, and purchased by Lawrence for the amount of the debt, interest, and costs, and he received a conveyance from the trustee.

It also appears, that Mrs. Patterson took a lease in the name of Brazee, and an agreement, that on the payment of \$900 by the 1st of February, 1871, Lawrence would convey the premises to her. On the termination of the lease she refused to surrender possession. Thereupon, Lawrence commenced an action of forcible detainer, to recover possession, and at the trial she produced the certificate of her marriage to Patterson, which seems to have been the first information which came to Lawrence's knowledge that she was a married woman, or her name was not Brazee. That suit was dismissed, and a bill in chancery was filed, setting up the facts, charging fraud in procuring the money and in the execution of the trust deeds, and alleging that there was due \$798—that the property belonged to Mrs. Patterson, and her husband had no interest therein. The bill charges, that by reason of the fraudulent concealment of her marriage, and the husband not joining in executing the trust deeds, the fee to the lot did not pass by the sale to complainant, and prays that the title be decreed to be in complainant, and for other and further relief.

An answer was filed, admitting that she executed the trust deeds in the name of Brazee because the title was so conveyed to her, and she supposed it was necessary, to convey title; sets up her coverture, and denies all fraud on her part, and the indebtedness is that of the husband, and not of the wife; denies all right to relief. A replication was filed.

On a hearing, the Court below, on bill, answer, replication, and proofs, found for complainant, found the amount due, and ordered that in default of its payment in thirty days the master sell the lot, on the usual notice, subject to redemption. Defendant, Melvina Patterson, brings the record to this Court on error, and asks a reversal.

It is urged in affirmance, and as the Court below found, that this loan was obtained by fraud. On the other side it is

claimed, and set up in the answer, that plaintiff in error intended, at the time, to execute the trust deeds in such a manner as to be valid and binding—that no fraud was intended and none was perpetrated. McChesney swears positively that he asked her the question whether she was a widow, and she said she was, and that this was before the loan was made; and defendant in error testified that she always represented herself to him as a single woman. On the contrary, plaintiff in error denies that she ever made such statements to either of them. It is insisted that she is corroborated by Dr. McDowell, with whom she consulted at McChesney's office, on the day she says she obtained the money, in reference to the sickness of her husband; but they state McChesney or defendant in error was not present.

This evidence, we think, strongly preponderates in favor of defendant in error. He and McChesney seem to testify fairly. On the other hand, plaintiff in error seems to have, from the beginning, acted in bad faith. She introduced herself to McChesney, and defendant in error says to his family, as Mrs. Brazee. We apprehend no one is so ignorant as not to know, in this country, that the name of the wife is, by the marriage, changed to that of the husband. She, then, must have known, when she passed herself by the name of her former husband, that she was stating what was not true—that if believed, she was deceiving defendant in error—and that he was relying on such statement. She could not have been so ignorant as not to have known that she was not signing her name to the notes and trust deeds. Why, if not for fraudulent purposes, did she thus give her name and so sign these papers? She says she supposed it was necessary because the deed was in that name. She should have given her true name, and it was a fraud to conceal it. If an unmarried woman, a widow, using her former name, were to so act, would not all persons say that such person was guilty of fraud? That concealing their own name and the use of the name of another, or a fictitious name, is evidence of deliberate, intentional fraud? Would any one credit the pretense that the

party supposed he was acting properly? Then, why should this be distinguished from the supposed case?

We are clearly of opinion that plaintiff in error was guilty of fraud in misrepresenting her name, in using a fictitious name, and also, in concealing her name, when she must have known that defendant in error would not have loaned the money and taken the trust deeds, without her husband joining with her in their execution, if she had given her true name and disclosed the fact that she was married.

Plaintiff in error testified her husband told her to come from Burlington to Galesburg and do the best she could; that she transacted the business and got the loan before she returned. When she got back she told him she had transacted her business satisfactorily. Now, it is but a reasonable inference to suppose she consulted with her husband in reference to this business, and it would not be a violent presumption to conclude it was planned and arranged between them that she should pass herself by the name of her former husband in procuring the loan, and this would be more easily done as she was known by that name by her neighbors. It is not probable she would take so important a step without consulting with her husband as to the manner in which it should be done.

We are unable to find any feature in this case that commends it to our sense of right. To permit plaintiff in error to retain the money and property would be unjust in the extreme, and surely cannot comport with equity and good conscience. It is not denied that if plaintiff in error intentionally committed a fraud she would be estopped to deny the effect of the execution of the deeds of trust. That she, in fact, committed a fraud, there would seem to be no doubt, and if permitted to escape liability on her deeds, she would have consummated a palpable wrong. She purchases property, borrows money to pay for it by pledging it, and then refuses to pay, and insists that the instruments pledging it are void, although she says she then acted in good faith, and intended to bind the property for the payment of the money.

This Court, in the case of *Oglesby Coal Company v. Pasco*, 79 Ill. 164, reviewed the authorities, and announced the rule that a married woman may preclude herself from denying the truth of her representations in cases of torts, but where her conduct relates to contract, there can be no estoppel. So, in the cases of *Schwartz v. Saunders*, 46 Ill. 18, and *Anderson v. Armstead*, 69 Ib. 452, it was held that where a wife fraudulently permitted her husband to represent himself as the owner of her separate property, and procure mechanics to make valuable improvements thereon, without disclosing her ownership or repudiating his authority, she is estopped afterward from denying his authority to cause the improvements to be made, when the mechanics seek to enforce their liens for payment of the amount due them for work done on the faith of the husband's authority.

The true doctrine is, that contracts and agreements of married women in reference to their real estate, when not joined therein by their husbands, where such agreements is free from fraud, cannot be enforced at law or in equity. But where married women make such contracts or agreements by fraudulent means, and thus obtain inequitable advantages, a Court of Chancery will hold them estopped from setting up and relying on their coverture to retain the advantage. The Court will require them to execute and perform the contract, if executory, or prevent them from avoiding it if executed, or will compel them to place the other party *in statu quo* before they will be allowed to rescind or repudiate such agreements or contracts. Whether the one or the other form of relief will be granted, must depend upon the equities of the case.

Here, plaintiff in error, by fraudulently concealing her marriage, and by declaring she was a widow when asked the question by the agent of defendant in error, gained an inequitable and unjust advantage of defendant in error, if she shall be permitted to retain the money she thus obtained and also to recover the land. She must be held to pay the money, or a lien for the same will be enforced against the premises she professed to mortgage to secure its payment. She must be



held estopped from relying on her coverture to escape its payment.

We perceive no error in the record, and the decree of the Court below must be affirmed.

Decree affirmed.

Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Reis *v.* Lawrence, 63 Cal. 129; Nixon *v.* Halley, 78 Ill. 611.

#### Disabilities Removed by Statute.

But so far as the disabilities of married women and infants to contract are removed by statute, so far will the doctrine of estoppel by deed or *in pais* apply.

SANDWICH MANUFACTURING CO. *v.* ZELLMER.

Supreme Court of Minnesota, 1892.

48 Minn. 408.

J. and F. Zellmer mortgaged land to plaintiff to secure a debt, both joining in the covenants of warranty. There was a prior mortgage of \$700 on the land, which was foreclosed after plaintiff's mortgage was given, and the land not being redeemed, the plaintiff's lien was lost. But F. Zellmer, the wife, afterward acquired title to the same land, and plaintiff now claims that this after-acquired title inures to its benefit, and that its mortgage is again a valid lien on the land.

VANDERBURGH, J. On the 11th day of September, 1882, the defendants Julius Zellmer and Fredericke Zellmer, his wife, executed and delivered to the plaintiff the three several notes or contracts in writing described in the complaint, whereby they agreed to pay the plaintiff, in the aggregate, the sum of \$488.29. They were given in consideration of, and to secure, the individual indebtedness to plaintiff of Julius Zellmer to that amount. They also, at the same time, duly executed the mortgage deed set up in the complaint, which instrument contained a covenant against prior incumbrances "except a mortgage of \$700," and also a covenant for quiet enjoyment and possession, and "that the parties of the first part, Julius and Fredericke Zellmer, his wife, would warrant and defend the

title to the said premises against all lawful claims." At the time of the execution of the mortgage, which conveyed the northeast quarter (N. E.  $\frac{1}{4}$ ) of section six (6), in township one hundred and one (101), range forty-five (45), including the homestead of the mortgagors, the defendant Julius was insolvent. The title to the land stood in his name, and the mortgage was given to secure his indebtedness above mentioned. There was a prior mortgage upon the premises, running to one Henry Zaun, for about \$700, which is the incumbrance referred to in the mortgage to plaintiff. The last-named mortgage was foreclosed in 1885. The title passed under the foreclosure, and afterward the owner conveyed the same by deed to the defendant Fredericke Zellmer, subsequently recorded; and thereafter, in the year 1887, she, by deed of conveyance, in which her husband duly joined, conveyed the same premises to Herman Zellmer.

The question here presented is whether the defendant Fredericke, who expressly joined in the covenants in the mortgage to plaintiff, is bound thereby; for if she is liable thereon, or is estopped thereby, as if she had not been under coverture, the conveyance to her inured to the benefit of the plaintiff by virtue of her covenant, and its mortgage is operative as a valid subsisting lien upon the land, as against her and her assignee, Herman Zellmer. It is hardly necessary to refer to the nature of a married woman's disability at the common law. She was not bound by her contracts or covenants, and was not estopped thereby from setting up an after-acquired title. It was competent for the Legislature to emancipate her from such disability, and enable her to obligate herself as if unmarried. The question here involved turns upon the construction of the statute of this State touching the rights and liabilities of married women. Prior to the Act of 1869, ch. 56, the statute had secured to them their separate estate, real and personal, with the rents, profits, and income thereof. But she could not dispose thereof without the consent of her husband; and her general, common-law disability to make contracts remained: 1858 Pub. St., ch. 61, § 106, p. 571; Revision 1866, G. S., ch. 69, and ch. 40,

§ 2; *Carpenter v. Leonard*, 5 Minn. 163 (Gil. 119); *Tullis v. Fridley*, 9 Minn. 81 (Gil. 68). But the provisions of Laws, 1869, ch. 56, were radical and sweeping, and were intended, in respect to her contracts, to invest a married woman, not merely with the right to contract in respect to her separate property, but with all the rights and liabilities of a *feme sole*, save only as expressly excepted or reserved by the same statute. It was evidently the intention of the Legislature to define clearly the nature and extent of such rights and liabilities: *Kingsley v. Gilman*, 15 Minn. 59 (Gil. 40); *Northwestern Mut. Life Ins. Co. v. Allis*, 23 Minn. 337. This statute does not, of course, have any reference to the domestic relations, or affect the rules of evidence, or the duty of the husband to provide for his family, though the wife might obligate herself for such purpose: *Flynn v. Messenger*, 28 Minn. 208 (9 N. W. Rep. 759). In *Northwestern Mut. Life Ins. Co. v. Allis*, *supra*, the wife had mortgaged her separate real property to secure a debt of her husband, which was evidenced by their joint note. The mortgage was not only held valid, but she was held personally liable for the deficiency upon foreclosure by action. It was contended that she was not liable because of the provisions of section three (3), which exempted her from the debts of her husband: but the Court say (page 341): "To give this effect to the section would be to allow inference and conjecture to qualify and restrict the meaning of the clear and precise language of the Act removing the wife's common-law disability to contract. Section 2 provides that 'any married woman shall be capable of making any contract, either by parol or under seal, which she might make if unmarried, and shall be bound thereby.' Then follow clearly expressed exceptions to her power to contract without her husband, relating only to her real estate. Section 4 expressly retains the common-law disabilities of husband and wife to contract with each other relative to the real estate of either. . . . 'But in relation to all other subjects either may be constituted the agent of the other, or contract each with the other, as fully as if the relation of husband and wife did not exist.'" No doubt the

defendant in that case would have been bound upon her covenants in the mortgage as well as her husband, and a covenant of warranty would have passed an after-acquired title: *Knight v. Thayer*, 125 Mass. 27; *Bigelow*, *Estop.* (5th ed.) 406, 407; *Kenworthy v. Sawyer*, 125 Mass. 28; *Goodnow v. Hill*, *Ib.* 587.

In the case at bar the defendant Fredericke, as to the payee, the plaintiff, made the debt her own by signing the note. She joined in the mortgage of the quarter section, containing the homestead, to secure this debt. She also joined in the covenants therein, including the covenant of warranty. It is contended, however, that she is not bound by covenants in the mortgage, because she must be presumed to have joined in the mortgage solely for the purpose of releasing the homestead or dower interest in the land; and it is claimed that the authorities in other States, particularly Illinois, support this contention. But no consistent general rule can well be formulated under the varying statutes of the different States on the subject, in connection with local statutes regulating the conveyance of real estate. It is true the wife's signature was necessary to pass a perfect title; but she was under no disability whatever in the matter of the execution of a deed with covenants, or the acknowledgment thereof. Though described as wife, her acknowledgment, under the statute, is that of a *feme sole*. Her husband was insolvent, and her covenants would afford additional security to the plaintiff. She was legally competent to enter into such covenants, and upon the face of the deed appears to have done so. For all the purposes thereof it was her contract; and it seems to us it would be a strained and unreasonable construction to give the deed the limited effect contended for it. When a deed on its face purports to convey a restricted or partial interest in land, the covenants, though general, will be limited to such interest: *Sweet v. Brown*, 12 Met. (Mass.) 177. But where a deed assumes to convey the land, and the covenants are unrestricted, it is difficult to see how the Court can limit or apportion its application, if it gives any effect to it at all. Here (to repeat), it will be observed, the covenant reads, "and the said Julius Zellmer and Riecke Zell-

mer, his wife, parties to the first part, do covenant . . . that the said parties to the first part will warrant and defend the title to the said premises against all lawful claims." Dower is in the nature of an incumbrance. Is the covenant of the wife operative to estop her as against a claim of dower subsequently arising, or does the deed simply release her present right, and is the covenant of both operative as to the legal title and estate of which the husband is seised, or does her covenant, if it is operative at all, relate merely to her statutory interests as wife? In view of her capacity to bind herself by her covenants, if operative at all, we are of the opinion that the covenant referred to must be construed in its natural and broader, and not in the restricted, sense. In construing a similar statute in Massachusetts, the Court say: "The provision in the Act that nothing therein shall authorize her to convey property to, or make contracts with her husband, is evidently not intended to impose any new restriction on her capacity, but merely to affirm the common-law rule, so far as the husband is the other party to the contract or grant, but does not prevent both of them from binding themselves by a joint promise to a third person:" *Major v. Holmes*, 124 Mass. 108.

The Acts of 1875 and 1876, superseding dower, and making provisions in lieu thereof, place the husband and wife substantially on the same footing as respects rights in the real property of each other. Construed in connection with the homestead law, and the Act concerning married women of 1869, the case stands thus: In whichever one the title of the homestead may be, neither can convey the same without the other. The wife's signature is necessary to the deed of other lands belonging to the husband, in order to pass a clear title; and the husband must join in all conveyance of the wife's lands. In Iowa they have a statute (Code, § 1937) in respect to liability upon covenants in such deeds, which is as follows: "In cases where either the husband or wife joins in a conveyance of real property owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance unless it is expressly so stated on the face thereof." We have no such

saving clause in our statute. Whether there ought to be is a matter addressed to the Legislature rather than to the Courts. In the absence of it, to attempt to place a limited construction upon such deeds, contrary to the fair and natural signification of the language used, is not warranted by the statute, or supported by sound reason. Mortgages frequently contain other express covenants than those relating to the title; as, for example, in this instance, to pay the debt or to pay taxes. Shall a married woman be bound by such covenants, and exempt from liability for the others? If she joins in all, there can be no reason why she should not be personally liable in all alike, since she is capable of so binding herself; and, if she is so liable they must operate by way of estoppel. The Courts are careful and conservative in the construction of statutes of this character, which are in derogation of the common law; but they cannot make exceptions and limitations which the statute does not warrant.

2. The disposition made of the question of the liability of Fredericke Zellmer upon the covenants in her husband's deed renders it necessary to consider the effect of the exception of the prior mortgage from the covenant against incumbrances upon her liability upon the covenant of warranty in the plaintiff's mortgage. The covenant runs in this way: "That the same is free from all incumbrances except a mortgage of seven hundred dollars;" but no other reference to that mortgage appears upon the face of the instrument. The question whether such an exception qualified or affected the covenant of warranty in the same deed was considered, but not finally decided, in *Merritt v. Byers*, 46 Minn. 74 (48 N. W. Rep. 417). *Jackson v. Hoffman*, 9 Cow. 273, is not in point; for there the grant was subject to the mortgage, so that all the covenants related to the estate as so incumbered. But in *Bricker v. Bricker*, 11 Ohio St. 240, the rule is laid down and approved that a preceding special covenant against incumbrances, which excludes the incumbrance complained of, is to be regarded as an exception of such incumbrance in the covenant of general warranty. This case is, however, not generally accepted as

authority, and the better opinion, following the reasoning of Lord ELLENBOROUGH, in *Howell v. Richards*, 11 East. 633, is that the covenant of warranty is not limited by the preceding restricted covenant against incumbrances. The two covenants are not connected, and are not of the same nature or import: *Estabrook v. Smith*, 6 Gray, 570; *Ogden v. Ball*, 40 Minn. 94 (41 N. W. Rep. 453). In *Howell v. Richards*, *supra*, it was held that a limited covenant for good title and good right to convey did not restrain or qualify the succeeding covenant for quiet enjoyment. The covenant for title and good right to convey are "connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of one may therefore properly enough be considered as virtually transferred to and included in the other; but the covenant for quiet enjoyment is of materially different import, and directed to a different end. . . . And it is perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of the title which he purports to convey than for quiet enjoyment." The exception in the deed is notice of the incumbrance, and exempts the grantor from an action upon the particular covenant; and this is all the effect that can be given to it: *Bennett v. Keehn*, 67 Wis. 162 (29 N. W. Rep. 207, and 30 N. W. Rep. 112), and cases. A prudent grantor may desire that the deed shall state the truth—and he is obliged to give the grantee notice of an incumbrance (1878 G. S., ch. 40, § 34); and he may know or believe that the incumbrance will be removed before it ripens into a title which would be ground for an eviction, so that he might risk a warranty against an eviction, when he might be unwilling to take the risk of a present liability for a breach of the covenant against incumbrances. "The same prudence, therefore, which might require the qualification of one of these covenants, might not require the same qualification of the other, affected, as it is, by different considerations, and addressed to a different object." *Howell v. Richards*, *supra*. If it is the wish or purpose of the grantor to make his con-

veyance subject to the mortgage, so as to affect and qualify all the covenants, or to accept an incumbrance from the covenant of warranty, it is very easy for him to do so; and no careful conveyancer would fail to make the exemption from all, as well as one, of the covenants of the deed, if it was the grantor's purpose to exempt himself from all liability. In *Gerdine v. Menage*, 41 Minn. 417 (43 N. W. Rep. 91), it was assumed that the exemption was general. Upon the point under consideration, reference is made to the authorities cited in *Merritt v. Byers*, *supra*, and also to *Ruggles v. Barton*, 16 Gray, 152.

Reversed and remanded.

*Dobbin v. Cordiner*, 41 Minn. 165; *Knight v. Thayer*, 125 Mass. 25.

But where by statute the husband must join the wife in her deed to make it valid, she will not be estopped by acts *in pais* to assert her title to realty: *Behler et ux. v. Weyburn*, 59 Ind. 143; *Cook v. Walling*, 117 Ind. 9, 2 L. R. A. 769.

### *Estoppel by Destruction of Deed.*

The redelivery of a deed of land to the grantor does not revest the title in him. But if the grantee, with intent to revest the title, destroys or cancels the deed so that it cannot be used in evidence, such act operates, on the principle of estoppel, under the rules of evidence, as a reconveyance, so far as the grantee and his privies are concerned.

#### FARRAR v. FARRAR.

Supreme Judicial Court of New Hampshire, 1827.

4 N. H. 191.

In 1811 Isaac F. conveyed an undivided one-half of certain lands to one Pierce, who, to secure the purchase-price, reconveyed the same by mortgage to the grantor. In 1814, being unable to pay the notes, it was agreed by the parties that the notes should be surrendered and the bargain given up. In 1822 Isaac F. conveyed the whole land to Noah F., who, finding that the said mortgage was still in existence, brought this action against Isaac F. on the covenant of warranty.

RICHARDSON, C. J. It is well settled that the cancelling of a deed does not revest property which has once passed under it by transmutation of possession: *Jackson v. Chase*, 2 Johns.



84 ; *Marshal v. Fisk*, 6 Mass. Rep. 24 ; 4 Barnewell & A. 672 ; *Doe v. Bingham*, 3 D. & E. 156 ; 2 H. Black. 263 ; *Woodward v. Aston*, 1 Ventris, 296 ; *Roe v. The Archbishop of York*, 6 East, 86 ; *Nelthorpe v. Dorrington*, 2 Levintz, 113 ; *Shep. Touch.* 69-70.

And in all cases a mere agreement to cancel a deed without actually cancelling it is without effect. Thus *Shepherd* in his *Touchstone*, 70, says, "If an obligee deliver up an obligation to be cancelled and the obligor do not afterward cancel it, but the obligee happen to get it again into his hands and sue the obligor upon it, the obligor hath not any plea to avoid it, for the deed remains still in force."

So in *Dana v. Newhall*, 13 Mass. Rep. 498, it was held that an agreement to cancel a deed, by which real estate had passed, did not revest the estate.

In *Cross v. Powell*, Cro. Eliz. 483, it was held that "if a deed be delivered to be cancelled to the party himself, yet if it be not cancelled and the other gets it again, it remains a good deed."

There are, however, cases in which an actual cancelling of a deed by which land has passed will in effect revest the estate. Thus where A. being seised and possessed of land purchased by him of B., by a deed duly executed but not recorded, contracted to sell the land to C., and for that purpose cancelled B.'s deed, who, at A.'s request, made a new conveyance to C., it was holden that C.'s title was valid, notwithstanding A. continued in the occupation of the land jointly with C. after the last conveyance : *Commonwealth v. Dudley*, 10 Mass. Rep. 403.

So in *Tomson v. Ward*, 1 N. H. Rep. 9, it was held that an unrecorded deed of land, voluntarily given up and cancelled by the parties to it with intent to revest the estate in the grantor as between them and as to all subsequent claimants under them, operates as a reconveyance and revests the estate in the grantor.

It is apprehended that in these cases the cancelling of the deed operates like a reconveyance, but that it is not in fact to

be considered as such. The true ground on which these decisions are to be supported is that the grantee having voluntarily and without any misapprehension or mistake consented to the destruction of the deed with a view to revest the title; neither he nor any other person claiming by a title subsequently derived from him is to be permitted to show the contents of the deed so destroyed by parol evidence. So that in fact there being no competent evidence that the land ever passed, the title is to be considered as having always remained in the grantor.

Such being the law, the case now before us is easily settled. The deed from the defendant to Pierce not having been actually cancelled, remains in full force. The same is true of the mortgage from Pierce to the defendant. The notes given by Pierce for the land and secured by the mortgage having been given up and cancelled under a misapprehension that the title to the land was revested absolutely in the defendant, they still remain due. It is then very clear that the defendant was seised of the land at the time he conveyed to the plaintiff.

The right of Pierce's heirs to redeem may be an incumbrance, for which the plaintiff may have a remedy, if his deed contains a proper covenant for the purpose, whenever he shall have extinguished that right. But in this action we are of opinion that there must be judgment on the verdict.

*Parker v. Kane*, 4 Wis. 12; *Bank v. Eastman*, 44 N. H. 438; *Commonwealth v. Dudley*, 10 Mass. 403; *Howe v. Wilder*, 11 Gray, 267; *Speer v. Speer*, 7 Ind. 178; *Blake v. Fash*, 44 Ill. 305; *Rogers v. Rogers*, 53 Wis. 36.

While the grantee cannot prove his title, having destroyed his deed, his creditors may; hence, as to them, the title is in the grantee: *Wilke v. Wilke*, 28 Wis. 296; *Blanney v. Hanks*, 14 Iowa, 400. See further: *Wilson v. Hill*, 13 N. J. Eq. 143; *Gilbert v. Bulkley*, 5 Conn. 262; *Hall v. McDuff*, 24 Me. 312.

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## The State.

The State may acquire title to realty under two distinct powers: (1) Eminent domain; (2) Taxation.

*Eminent Domain.*

Private property may be taken by the State for public use, but not without just compensation to the owner.—*U. S. Const., Fifth Amendment.*—*Minn. Const., Art. I, § 13.*

## BOOM CO. v. PATTERSON.

Supreme Court of the United States, 1878.

98 U. S. 403.

Mr. Justice FIELD. The plaintiff in error is a corporation created under the laws of Minnesota to construct booms between certain designated points on the Mississippi and Rum Rivers in that State. It is authorized to enter upon and occupy any land necessary for properly conducting its business; and, where such land is private property, to apply to the District Court of the county in which it is situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation. It is unnecessary to state in detail the various steps required to obtain the condemnation. It is sufficient to observe that the law is framed so as to give proper notice to the owners of the land, and secure a fair appraisal of its value. If the award of the commissioners should not be satisfactory to the company, or to any one claiming an interest in the land, an appeal may be taken to the District Court, where it is to be entered by the clerk "as a case upon the docket" of the Court, the persons claiming an interest in the land being designated as plaintiffs, and the company seeking its condemnation as defendant. The Court is then required to "proceed to hear and determine such case in the same manner that other cases are heard and determined in said Court." Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed

by the jury or the Court, as the case may be, the amount of the assessment is to be entered as a judgment against the company, which is subject to review by the Supreme Court of the State on a writ of error.

The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi River, above the Falls of St. Anthony, in the county of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error the company sought to condemn for its uses; and upon its application commissioners were appointed by the District Court to appraise its value. They awarded to the owner the sum of \$3,000. The company and the owner both appealed from this award. When the case was brought before the District Court, the owner, Patterson, who was a citizen of the State of Illinois, applied for and obtained its removal to the Circuit Court of the United States, where it was tried. The jury found a general verdict assessing the value of the land at \$9,358.33; but accompanied it with a special verdict assessing its value aside from any consideration of its value for boom purposes at \$300, and, in view of its adaptability for those purposes, a further and additional value of \$9,058.33. The company moved for a new trial, and the Court granted the motion, unless the owner would elect to reduce the verdict to \$5,500. The owner made this election,

and judgment was thereupon entered in his favor for the reduced amount. To review this judgment the company has brought the case here on a writ of error.

The only question on which there was any contention in the Circuit Court was as to the amount of compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated. But the company now raise a further question as to the jurisdiction of the Circuit Court. Objections to the jurisdiction of the Court below, when they go to the subject-matter of the controversy, and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower Court.

The position of the company on this head of jurisdiction is this: That the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an Act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the Courts

between parties—the owners of the land on the one side, and the company seeking the appropriation on the other—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court: *Turner v. Halloran*, 11 Minn. 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the Courts of law for its value. That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed.

The Act of March 3, 1875, provides that any suit of a civil nature, at law or in equity, pending or brought in a State Court, in which there is a controversy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper district; and it has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the State under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States: *Paul v. Virginia*, 8 Wall. 177. And in *Gaines v. Fuentes*, 92 U. S. 20, it was held that a controversy between

citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the Circuit Court, and that it had jurisdiction to determine the controversy.

Upon the question litigated in the Court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated, there is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted ; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule ; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the

lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river ; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons, except the plaintiff in error, were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. The clause in its charter authorizing and requiring it to receive and take the entire control and management of all logs and timber to be conveyed to any point on the Mississippi River must be held to apply to the logs and timber of parties consenting to such control and management, not to logs and timber of parties choosing to keep the control and management of them in their own hands. The Mississippi is a navigable river above the Falls of St. Anthony, and the State could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners. Whilst in *Atlee v. Packet Company*, 21 Wall. 389, we held that a pier obstructing navigation, erected in the river as part of a boom, without license or authority of any kind except such as arises from the ownership of the adjacent shore, was an unlawful structure, we did not mean to intimate that the owner of land on the Mississippi could not have a boom adjoining it for the reception of logs of his own or of others, if he did not thereby impede the free navigation of the stream. Aside from this, we do not think that the State is precluded by anything in the charter of the company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands con-



demned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, In the Matter of Furman Street, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" In *Goodwin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or any other particular use, but generally for any and all uses for which it might be suitable. And in *Young v. Harrison*, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore,

allowed in the estimate of compensation to be awarded to the owner.

These views dispose of the principle upon which the several exceptions by the plaintiff in error to the rulings of the Court below in giving and in refusing instructions to the jury were taken, and we do not deem it important, therefore, to comment upon them.

Judgment affirmed.

### **Fee Simple.**

**The State may take the fee simple or a lesser interest.**

SWEET *v.* BUFFALO ETC. Co.

Court of Appeals, New York, 1879.

79 N. Y. 293.

The plaintiff brings an action of ejectment to recover possession of certain lands.

ANDREWS, J. The right of the plaintiff to recover in this action depends upon the question whether the city of Buffalo by the proceedings taken under chapter 547 of the Laws of 1864 became vested with the fee of the land in controversy. If the title of the plaintiff's grantor was divested by the proceedings under the Act the deed to the plaintiff conveyed no title or interest in the premises and he cannot maintain ejectment, and it is wholly immaterial whether the license from the Common Council of the city, under which the defendant entered upon and laid its track over the *locus in quo* was or was not valid. The plaintiff must recover on the strength of his own title, and if he has none, the question of the defendant's title is unimportant.

The Act referred to is entitled "An Act authorizing the Common Council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie."

The first section authorizes the Common Council to lay out, make and open a public ground one hundred and thirty feet wide along the shore or margin of Lake Erie for the purpose of maintaining thereon and protecting a sea-wall or breakwater and to take and appropriate for that purpose certain specified lands including the premises in controversy. It provides that the land shall be "taken and appropriated" in the same manner and that compensation therefor shall be ascertained and made as provided in the charter of the city in proceedings for the taking of land for laying out streets and highways therein. Upon payment or tender of the compensation awarded to the owner or owners of the land taken, the section declares that "the fee thereof shall vest in the city of Buffalo for the purpose aforesaid and thenceforth the said land shall be and remain a public ground for the purpose of maintaining and protecting thereon or any part thereof a sea-wall or breakwater and protecting the harbor of said city and the lands adjacent from the encroachments of said lake," and that nothing in the Act contained shall prevent the city from acquiring title to the lands described therein, for the purpose, stated, by voluntary conveyance from the owner.

The second section provides that when the city shall have obtained "title to the land," either by proceedings under the Act or by voluntary conveyance as therein authorized, "the said land shall be subject to the control of the Common Council of said city as one of the public grounds thereof, except so far as said control may have been heretofore or may be hereafter ceded to the United States," and it authorizes the Common Council to direct a deed or deeds of conveyance of such land, or any part thereof, to be made in the name of and under the corporate seal of the city to the United States, "for the purpose of erecting and maintaining thereon a sea-wall or breakwater," on condition, to be expressed therein, that the United States shall maintain and keep in repair on said land the said sea-wall or breakwater; and the section declares that "the execution and delivery of the deed or deeds shall vest in the United States the title to the land for the purpose and

subject to the condition aforesaid." The third section prohibits the removal by any person from the premises of any earth, sand, or gravel after the lands shall have been conveyed to or taken by the city under the Act, without permission of the Common Council or the United States, as the case may be, or any excavation thereon so as to impair or injuriously affect the sea-wall or breakwater, and makes it a misdemeanor for any person willfully to tear down or remove any part thereof. The fourth section prohibits the erection of any building on the premises taken or conveyed under the Act, and makes it a misdemeanor for any person after the land shall have been appropriated by or conveyed to the city to erect upon or move on to said land any building. The fifth section authorizes the Common Council to pass ordinances to prevent the erection or placing of any building on the land, or the taking of any earth, sand, or gravel therefrom, and for the protection of the sea-wall or breakwater, and to impose penalties for a violation thereof. The sixth section requires the Common Council upon perfecting the proceedings for taking and appropriating the lands, or upon conveyance thereof, to declare by resolution "the said land to be a public ground for the purpose of maintaining and protecting a sea-wall or breakwater."

It is conceded that proceedings were instituted under this Act to take the lands in question, and that by virtue of such proceedings all the interest in the premises in question which the city could acquire thereby became vested in the city. There is therefore no question of regularity to be considered, and it is to be assumed that compensation has been made or tendered to the owner of the land to the full extent authorized by the Act. It is claimed, however, that under the Act and proceedings thereunder the city acquired an easement only in the premises for the purpose of maintaining a sea-wall or breakwater, and that the fee of the land remained in the owner subject to this servitude.

This position, if it can be maintained, must rest upon the ground that it was not the intention of the Act that a fee should be acquired by the city in the premises taken, and

not upon the ground that there was any lack of power in the Legislature to authorize the acquisition by the city by compulsory proceedings of the fee of the land for the use mentioned in the Act. The use was unquestionably a public one, and it is well settled that it is within the competency of the Legislature in authorizing land to be condemned for a public use which may be permanent, to determine what estate shall be taken, and to authorize the taking of a fee or any lesser estate in its discretion, and that a fee may be taken although the public use for which the land is to be taken is special and is not of necessity permanent or perpetual: *Heyward v. The Mayor, etc.*, 7 N. Y. 214; *Rexford v. Knight*, 11 Ib. 308; *Brooklyn Park Comrs. v. Armstrong*, 45 Ib. 234. It is true as claimed by the plaintiff's counsel that Acts authorizing the taking of private property for public use are to be strictly construed and will not be deemed to justify the taking of any greater estate or interest than such as is expressly, or by necessary implication authorized by the statute under which the application is made: *The Washington Cemetery v. Prospect Park R. R. Co.*, 68 N. Y. 591; *Sixth Avenue R. R. Co. v. Kerr*, 72 Ib. 530. But there is no other restraint upon the power of the Legislature to authorize land to be taken for public use, except that which imposes the condition of making compensation to the owners. When the statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired by proceedings thereunder, on the ground that in the judgment of the Court the taking of an easement only would accomplish the public purpose which the Legislature had in view. That is a legislative and not a judicial question.

It seems very plain that the Legislature intended by the Act in question to authorize the city of Buffalo to acquire by proceedings under the Act the fee of the premises described therein. The lands are to be "taken and appropriated" for a use continuous and permanent in its character. The compensation is to be ascertained in the same manner as the compensation for lands taken by the city for streets and highways in which cases as the charter then was, the fee was taken, and

there can be no question that the commissioners under the Act of 1864 were authorized and required to award the full value of the land taken. The Act declares that upon the payment or tender of the compensation award for the lands taken "the fee thereof shall vest in the city," and the city, "after title to the land shall have been acquired," is authorized to convey to the "United States the said land or any part thereof." It is impossible in view of the clear and unambiguous terms of the statute, which vests in the city a fee in the lands taken under the Act and the right to convey under the limitations mentioned, and provides for the payment to the owner of the full value of his property, to sustain the contention of the plaintiff that the city took an easement only, which is not a title or estate in land but a mere privilege therein distinct from any ownership of the soil. It is claimed that the interest taken by the city is for a special purpose, to wit: the maintaining and protecting of a sea-wall, and this purpose is repeatedly declared in the Act. But we perceive no inconsistency in declaring the particular use for which the city is to take and hold the land, and at the same time providing that it should take a fee. The particular use declared is in the nature of a trust engrafted on the fee, and the people through its proper officers could compel the city to observe the trust, or restrain it from any use of the land inconsistent with it. The purpose expressed does not qualify the estate taken but simply regulates and defines the use for which it shall be held. The argument that the Act makes provision for the protection of the property and authorizes the Common Council to do certain things which it would be unnecessary to provide for if the city became the general owner is not, we think, entitled to much weight, in view of the explicit declaration of the Act that the fee of the land acquired under the Act should vest in the city. The principle of construction that authorizes the examination of an entire statute or instrument to ascertain the meaning of any part, when the meaning is ambiguous or obscure, is well settled, but in this case there is no need of construction. The word *fee* has a clear, definite, and legal

signification, and is wholly inconsistent with the claim that an easement in the land only was authorized to be taken.

The objection that the Act is void under section 16 of article III of the Constitution is not well taken. The title, we think, sufficiently indicated the subject of the Act. It would be expected that in an Act authorizing a municipal corporation to lay out a public ground provisions would be found for condemning land for that purpose. The conclusion is that the plaintiff failed to establish any right or title to the premises in question and the judgment must therefore be affirmed.

Judgment affirmed.

*Cotton v. Miss. & Rum River Boom Co.*, 22 Minn. 372; *Scott v. St. P. & C. Ry. Co.*, 21 Minn. 322.

### *Taxation.*

**The State may, under the power of taxation, sell and convey the title to land in fee simple or lesser interest in default of payment of taxes assessed thereon.**

DOE *ex dem.* GLEDNEY *v.* DEAVORS.

Supreme Court of Georgia, 1850.

8 Ga. 479.

NISBET, J. 1. This was an action of ejectment. The plaintiff claimed under a tax collector's deed, and the defendant under a sheriff's deed. The sheriff's deed bears date in April, 1841, and the tax collector's deed in December of the same year. The sheriff sold the land under an execution in favor of a citizen, as the property of the defendant in execution. The collector caused the same land to be sold for the taxes due by the same defendant, assessed for that year. The question of title being before the Circuit Court, the presiding Judge instructed the jury, "that the lien or security of the State, for the tax due from the defendant in execution for the year 1841, was destroyed by the sheriff's sale, and the subsequent sale conveyed no title, unless the jury believed that the

sheriff's sale was made for the purpose of avoiding the payment of taxes due, and that the only preference that existed for said tax, was the right of the tax collector to claim out of the fund raised by the sheriff's sale." To this charge the plaintiff in error excepted, and the question is, whether the tax due by a citizen is a lien upon his property, which can be enforced by a re-sale, in a case like this, where the property has been sold under a general judgment before it is returned, yet after the tax upon it has been imposed by law. The presiding Judge does not seem to hold, that generally taxes are not a lien, but believes that the lien was destroyed by the sheriff's sale, and that after such sale, the only way in which the State can collect her taxes, is by putting in a claim upon the fund. Inasmuch as the land had been sold, the view of the Judge seems to be, that the State occupied the position of a favored or preferred claimant on it, and failing to assert her claim, lost it, unless the sale by the sheriff was intended to defeat the payment of the taxes. The question is an important one, and it will be necessary to consider, generally, the question, to what extent assessed taxes are a lien upon the property of the citizen, and if they are a lien particularly, whether in this case it was, as held by the presiding Judge, destroyed by the sale by the sheriff. The right to tax the whole property of the citizen for the defense of the State and the support of the government, is not a questionable proposition. It is an incident of sovereignty. All property which vests in the citizen by grant from the estate, is liable to taxation, without a reservation of the right to tax. That right grows out of the right of the citizen to governmental protection and the corresponding obligation of the government to protect him. *Revenue* is indispensable to the maintenance of all the privileges and immunities of the people—it is also indispensable to national independence, without which individual immunities and privileges are valueless. Hence it is, that in the very nature of the social compact, as a basis upon which the foundations of government are laid, the property of the citizen is pledged for these purposes—pledged without any



express declaration of a pledge. In the act of organizing a government, the pledge is implied. It is one of the elements of national being. The people who make a government, *ipso facto*, assent to it. This inherent right to lay and collect taxes, may be limited and regulated by the fundamental law, as it is by the Constitution of our Union. The amount and the mode of assessment, and the manner of collecting it, lies within the legislative competency, to be arranged from time to time, by law, according to the public exigencies. In this country the people impose the taxes which they pay, through their representatives, and the taxing power is not, therefore, likely to be abused. Upon these principles, it has been held, in a sister State, that the taxes due, in the absence of any legislative declaration upon that subject, are a mortgage to the exclusion of any other lien or incumbrance. The decision goes upon the idea, that the obligation to support the government precedes and is paramount to every contract between citizens; and without amplifying this general doctrine, I leave it with my concurrence: 2 Bay's Rep. 244; 4 Peter's R. 514; 4 Wheat. 428.

However sufficient these principles may be to sustain the tax lien, we are not left to them alone. In our judgment, the laws of the State give to assessed taxes a lien which overrides every other security or incumbrance. By the 14th section of the Act of 1804, which is still of force, it is declared, that "the taxes imposed by this Act shall be preferred to all securities and incumbrances whatever." Prince, 847. This section creates a lien. It is argued that it only gives a preference or creates a *grade* of debt, in contemplation of a contest with other securities and incumbrances. Our opinion is, that it creates a general lien, which attaches at the time when the property is liable by law to taxation, upon all the property of the citizen. It is true that the phraseology of the Act might have been more plainly declaratory of a lien. But what is its effect? A legal preference, that is priority, is given to the taxes, not only over all incumbrances whatever—such as mortgages and judgments—but also over all *securities*—securi-

ties by title, as well as other securities. A deed, therefore, upon private sale will not defeat the preference. It inhibits a sale to the exclusion of the taxes. And it can only defeat the security of a deed, upon the idea of a lien on the property. If a title by deed, upon private sale, will not defeat the tax lien, a title by deed upon a judicial sale will not, *a fortiori*; for, the lien of the judgment, under which the purchaser at the judicial sale gets his title, is unquestionably postponed by the Act. There is no particular form of words necessary to create a lien. The plain import of this Act is a legal preference for satisfaction *out of the property* of the person taxed, over every security and every incumbrance, and that is a lien. The Legislature, no doubt, intended simply to declare the great fundamental principle, that the *property* of the citizen is pledged to the exclusion of all private contracts—to the support of the government. That principle elucidates the enactment. If the lien exists without a legislative declaration—if it be an elementary principle of government, recognized by the ablest statesmen, it can hardly be presumed that the Legislature intended to innovate upon and weaken it. If the Act only creates a preference over other claims, it is available for the protection of the State, only when a citizen is dead and his estate is for distribution, or when he is insolvent, or when there is a fund in hand for distribution. Upon this idea, it looks to marshaling assets. And in case of the alienation, *bona fide*, of property by private sale, this construction would wholly defeat the security of the State. In this very case, as I shall show, it would defeat the collection of taxes altogether. I do not mean to say, that when the money of the citizen is in the hands of the Court, and the tax is in a situation to be presented as a claim upon it, that that claim would not be good. If the Act creates a lien on property, the lien equally attaches upon its proceeds. But in such a case, I do not believe that the lien of the State would be lost by its agent failing to put in a claim upon the fund, upon the principle that no *laches* can be imputed to the State. It is not enough to say, that the collector and his security would be in that case liable,

for that liability is only cumulative security for the State. The lien is a general one. The whole property is bound for the taxes. That it is not confined to the specific property upon which each item of the tax arises, is manifest in this. The law requires the personal estate first to be sold to pay the tax, and if none, or not enough, then the real estate. Accordingly, taxes originating on lands may be paid out of the personal estate, and *vice versa*. It takes effect when, by law, in each and every year the property is made taxable—that is to say, on the 1st of January. It is the imposition of the tax by law which appropriates, if needs be, the property of the citizen to the public use. The lien, therefore, does not commence only with the return of the property, or with the return of the digest by the receiver to the collector, or with the issuing of execution to enforce payment: Dudley, 15 ; 8 Watts & Searg. R. 449.

It is argued that the taxes are not a lien, from certain provisions of the tax law—such as that which declares all sales, made to prevent their payment, void—that which makes them first to be paid, in case of the death of the debtor, and charges the administrator, personally—and that which charges the mortgagee with the tax due upon the mortgaged property. These provisions of law do not set aside the lien created by the 14th section, nor are they incompatible with it. Some of them, it may be, are unnecessary—as for example, that which declares void all gifts and conveyances, etc., made to avoid the payment of taxes. If there is a lien, this provision is useless. All these things, and others—for example, the summary process with which the collector is armed to collect, and the prohibition of all judicial interference between the State and the debtor, look to the same end, and that is the *prompt and necessary* payment of the taxes. The State must have her revenue, at all hazards. Hence these various stringent provisions of law to constrain payment. Prompt collection is as necessary as the lien. But if, in all cases of sale of the property, as here, the State is to rely upon the fund, she may be delayed by litigation, and is really made

dependent upon judicial interference. She must put in her notice, or file her injunction—await the regular time for a hearing—abide delays, continuances, and collateral issues. In short, she is no better off than any other judgment creditor. No. To collect taxes, the State moves with uncontrollable power directly and instantaneously upon the property; and if, in the exercise of this stern but necessary attribute of sovereignty, the citizen is injured, his only redress is by petition to the Legislature.

2. In the case made in this record, if the doctrine of the Court prevails, and in all like cases, the tax will be lost to the State. Here the sheriff sold in April. The land sold was taxable on the 1st of January preceding. At the time of sale, the land had not been returned to the receiver—the collector knew not that it was taxable as the property of the defendant—he had no power over it—he could put in no notice to retain—he could institute no process to hold up the fund. The sheriff, officially, could know nothing of the claim of the State for taxes. He was not restrained from paying over at once the proceeds of the sale to the judgment in his hands; and if paid, then all means of security to the State is lost forever. The collector and his sureties would not be liable, for he could not be in default. So it would be in any case where there is a *bona fide* sale of property intervening the first of January and the return of the digest of taxes to the collector, whether that sale be private or judicial. The consequence of this doctrine would clearly be a loss to the State of no inconsiderable amount of her revenue, and a serious injustice to the tax paying portion of the people.

In the case before me, the collector has pursued the course which the law points out. When the tax was collectible, and default in payment made, he issued his execution—the land is levied on and sold. The question put by one of the counsel for plaintiff in error (Col. Brown), is conclusive of the case. If these proceedings are authorized by law (and that they are, no none questions), *does not the purchaser get a title?* If he does not, then the State has devised an ingenious piece of

statutory mechanism, for the purpose of entrapping her citizens. The previous purchaser has no right to complain, for the tax lien is by public law, and he is presumed to buy with notice.

In the argument of this cause, the defendant in error relied upon the decision of the Supreme Court of the United States in *Conrad v. The Atlantic Insurance Company of New York*, 1 Peters, 386. That decision places a construction on the 65th section of the Act of Congress, passed in 1799, which is as follows: "In all cases of insolvency, or when any estate in the hands of executors, administrators, and assigns, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States shall be first satisfied; and any executor, administrator, or assignee, or other person, who shall pay any debt due by the person or estate, for whom or for which they are acting, previous to the debt or debts due to the United States from such person or estate, being first duly satisfied and paid, shall be answerable in their own person and estate, etc." The Supreme Court held, that the priority, thus limited in behalf of the United States, was not a right that superseded and overruled an assignment made by the debtor, and subjected the property so assigned to execution; but was a right of prior payment out of the general funds of the debtor, in the hands of the assignee. This decision is inapplicable to the present case. A similar provision of law is made in this State when a debtor for taxes dies between the time of giving in his taxes and the payment. A *priority* is created in behalf of the State for the tax, and the administrator is bound to respect that priority, at the peril of personal liability: *Prince*, 847. If this were the only provision of our law on the subject, the question would be very different. We should construe it as the Supreme Court did, a like law of Congress, as giving a right only of prior payment. But it is not. In the same section, the Legislature declares that the taxes shall be preferred to all securities and incumbrances whatever. As before stated, the priority given in case of death, is cumulative, and intended to secure prompt payment of taxes. The law of

Congress does not pretend to give to the United States a lien—it only pretends to create a preference in the *cases stated*, of *insolvency*, etc. It cannot be enlarged beyond its terms. Our law, in general terms, conveys a preference over all *incumbrances and securities*, and, as we think, creates a lien.

Let the judgment be reversed.

### Tax Deed.

WOOD *v.* ARMOUR.

Supreme Court of Wisconsin, 1894.

88 Wis. 488; 60 N. W. Rep. 791.

In 1850 Mann owned certain land in fee, which he then conveyed to Wood, of New York. Wood died in 1864, still owner of the land. The plaintiff in this action is his widow. In 1856 Mann went into possession of the land, either adversely or by permission, which fact is in dispute. Mann remained in possession until 1887. He paid taxes till 1877. The land was sold for taxes in 1883 and 1884, and tax deeds, fair on their face, were issued to one Parks. In 1887 Mann's wife bought these tax deeds with money of her own, and took the rents and profits of the land, made repairs, redeemed some unpaid taxes, and paid current taxes thereon, her husband acting as her agent. In 1892 Mrs. Mann conveyed the title to one Morse, and he conveyed it to Armour, the defendant. Mrs. Woods brings an action of ejectment, claiming that Mrs. Mann acquired no title, either by adverse possession or by the tax deed.

WINSLOW, J. The record is quite voluminous. The foregoing statement does not state all of the facts which appear in evidence, but it is believed that it states all the facts which are material to the decision of the case. The question was much discussed, both in the briefs and in the argument, whether Curtis Mann's entry and subsequent possession were adverse. In the view we have taken of the case, we find it unnecessary to decide the question. When the tax deed was executed the title to the property was either in the plaintiffs or in Curtis Mann, and in either event it was entirely competent for Nancy Mann, out of her separate estate, to purchase that tax title. The tax deeds were fair on their face. No ir-

regularity is shown or claimed in the levy of the tax upon which they were based. Hence, they conveyed a title in fee simple, unless there was some legal reason why Nancy Mann could not purchase that title.

It is suggested that Curtis Mann could not acquire the tax title, because he was in possession of the land and it was assessed to him, so that he was under legal obligation to pay the taxes. However much force this argument might have against a title acquired by Curtis Mann, or by a third person collusively for Mann's benefit, it has no force against Mrs. Mann, who was not in possession and was under no obligation to protect the title. No duty rested on her to pay the taxes on these lands, whether they belonged to her husband or to the plaintiffs. She had a separate estate, and if she chose to use a part of it in purchasing a tax title on these lands in good faith and for her own benefit, we know of no rule, in the present state of the law as to the property rights of married women, which would prevent her from doing so. The evidence showed, and the Court rightly found, that after such purchase she went into possession of the lands in question, and held such possession until she conveyed the same to the defendant's grantor. The actual manual possession during this time was in tenants, but we think the possession of these tenants, under the facts, must be held to be the possession of Mrs. Mann. She received the rents and profits, built fences, repaired buildings, paid the taxes, and managed the property as her own. It is true that her husband acted as her agent in many of these matters, but it is entirely competent for the husband to so act in the transaction of his wife's separate business, and we do not see how this is to prejudice the wife's rights. Certainly, no one has had possession adverse to her since she acquired title. The plaintiffs have not, and her husband has not, nor have the tenants. She put her title on record at once, thus announcing to all the world, including the plaintiffs, that she claimed title to the premises. This constituted not only a "challenge of the right of the original owner and all opposing claimants, but it was notice to them

of its existence and presumed validity :” *Knox v. Cleveland*, 13 Wis. 245.

In any view which we have been able to take of the case we have been unable to see why the tax title acquired by Nancy Mann did not vest in her a perfect title to the property, which is now vested in the defendant, her grantee.

Judgment affirmed.

The several States of the Union regulate the method of taking and determine the interest that shall pass under a tax sale : 2 *Blackwell on Tax Titles*, § 965 ; *McFadden v. Goff*, 32 Kan. 36 ; 4 Pac. Rep. 841 ; *Parker v. Baxter*, 2 Gray, 185 ; *Sinclair v. Larned*, 51 Mich. 335 ; *Jones v. Devore*, 8 Ohio St. 430 ; *Brown v. Austin*, 41 Vt. 262 ; *Turner v. Smith*, 14 Wall. 553 ; *Sumner v. Kanawha Co.*, 26 W. Va. 159 ; *Jackson v. Babcock*, 16 N. Y. 246 ; *Jarvis v. Peck*, 19 Wis. 84.

## h

### Forfeiture.

**Title to land may be lost to one and vest in another by virtue of statutes providing punishment for illegal acts.**

#### WALLACH v. VAN RISWICK.

Supreme Court of the United States, 1875.

92 U. S. 202.

The complainants were the children of Charles S. Wallach, a Confederate officer in the war of 1861. His estate in Washington, D. C., was seized under the Confiscation Act of July 17, 1862, condemned according to law, and sold to Van Riswick. After the war, in 1866, Wallach conveyed to Van Riswick all of his supposed interest in the land, and afterward died. Wallach's children began a suit, claiming that after the seizure of the land by the government no interest remained in their father, and that they, as his heirs, were entitled to the land. Van Riswick demurred, and his demurrer was sustained ; hence this appeal.

Mr. Justice STRONG. The formal objections to the bill deserve but a passing notice. It is not, we think, multifarious ; and all persons are made parties to it who can be concluded or affected by any decree that may be made—all persons who have an interest in the subject-matter of the controversy. The main ques-



tion raised by the demurrer, and that which has been principally argued, is, whether, after an adjudicated forfeiture and sale of an enemy's land under the Confiscation Act of Congress of July 17, 1862, and the joint resolution of even date therewith, there is left in him any interest which he can convey by deed.

The Act of July 17, 1862, is an Act for the confiscation of enemies' property. Its purpose as well as its justification, was to strengthen the government, and to enfeeble the public enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause: *Miller v. United States*, 11 Wall. 268. With such a purpose, it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on the war against the government. The statute indicates no such intention. The contrary is plainly manifested. The 5th section enacted that it should be the duty of the President of the United States to cause the seizure of "*all the estate and property, moneys, stocks, credits, and effects,*" of the persons thereafter described (of whom Charles S. Wallach was one), and to apply the same and the proceeds thereof to the support of the army of the United States; and it declared that all sales, transfers, and conveyances of any such property should be null and void. The description of property thus made liable to seizure is as broad as possible. It covers the estate of the owner—all his estate or ownership. No authority is given to seize less than the whole. The 7th section of the Act enacted that to secure the condemnation and sale of any such property (*viz.*: the property seized), so that it might be made available for the purpose aforesaid, proceedings should be instituted in the Court of the United States; and if said property should be found to have belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, the same should be condemned as enemies' property, and become the property of the United States, and might be disposed of as the Court should decree, the proceeds thereof

to be paid into the treasury of the United States for the purpose aforesaid. Nothing can be plainer than that the condemnation and sale of the identical property seized were intended by Congress; and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the Act. If, therefore, the question before us were to be answered in view of the proper construction of the Act of July 17, 1862, alone, there could be no doubt that the seizure, condemnation, and sale of Charles S. Wallach's estate in the lot in controversy left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another. This we understand to be substantially conceded on behalf of the defendant.

But the Act of 1862 is not to be construed exclusively by itself. Contemporaneously with its approval, a joint resolution was passed by Congress, and approved, explanatory of some of its provisions, and declaring that "no proceedings under said Act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." The Act and the joint resolution are doubtless to be construed as one Act, precisely as if the latter had been introduced into the former as a proviso. The reasons that induced the passage of the resolution are well known. It was doubted by some, even in high places, whether Congress had power to enact that any forfeiture of the land of a rebel should extend or operate beyond his life. The doubt was founded on the provision of the Constitution, in § 3, art. III, that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." It was not doubted that Congress might provide for forfeitures effective during the life of an offender. The doubt related to the possible duration of a forfeiture, not to the thing forfeited, or to the extent and efficacy of the forfeiture while it continued. It was to meet the doubt which did exist that the resolution was adopted. What, then, is its effect? and what was intended by it? Plainly it should be so construed as to leave it in accord with the general and leading purpose of the Act of which it is substantially a

part; for its object was, not to defeat, but to qualify. That purpose, as we have said, was to take away from an adherent of a public enemy his property, and thus deprive him of the means by which he could aid that enemy. But that purpose was thwarted, partially at least, by the resolution, if it meant to leave a portion, and often much the larger portion, of the estate still vested in the enemy's adherent. If, notwithstanding an adjudicated forfeiture of his land and a sale thereof, he was still seized of an estate expectant on the determination of a life-estate which he could sell and convey, his power to aid the public enemy thereby remained. It cannot be said that such was the intention of Congress. The residue, if there was any, was equally subject to seizure, condemnation, and sale with the particular estate that preceded it. It is to be observed that the joint resolution made no attempt to divide the estate confiscated into one for life, and another in fee. It did not say that the forfeiture shall be of a life-estate only, or of the possession and enjoyment of the property for life. Its language is, "No proceedings shall work a forfeiture beyond the life of the offender;" not beyond the life *estate* of the offender. The obvious meaning is that the proceedings for condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. After his death, the land shall pass or be owned as if it had not been forfeited. Nothing warrants the belief that it was intended that, while the forfeiture lasts, it should not be complete; viz.: a devolution upon the United States of the offender's entire right. The words of the resolution are not exactly those of the constitutional ordinance; but both have the same meaning, and both seek to limit the extent of forfeitures. In adopting the resolution, Congress manifestly had the constitutional ordinance in view; and there is no reason why one should receive a construction different from that given to the other. What was intended by the constitutional provision is free from doubt. In England, attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would other-

wise be his heirs. Thus, innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers. Its purpose has never been thought to be a benefit to the traitor, by leaving in him a vested interest in the subject of forfeiture.

There have been some Acts of Parliament, providing for limited forfeitures, closely resembling those described in the Act of Congress as modified by the joint resolution. The statute of 5th Elizabeth, c. 11, "against the clipping, washing, rounding, and filing of coins," declared those offenses to be treason, and enacted that the offender or offenders should suffer death, and lose and forfeit all his or their goods and chattels, and also "lose and forfeit all his and their lands and tenements during his or their natural life or lives only." The statute of 18th Elizabeth, c. 1, enacted the same provision "against diminishing and impairing of the queen's majesty's coin and other coins current within the realm," and declared that the offender or offenders should "lose and forfeit to the queen's highness, her heirs and successors, all their lands, tenements, and hereditaments during his or their natural life or lives only." Each of these statutes provided that no attainder under it should work corruption of blood, or deprive the wife of an offender of her dower. The statute of 7 Anne, c. 21, is similar. They all provide for a limited forfeiture—limited in duration, not in quantity. Certainly no case has been found, none, we think, has ever existed, in which it has been held that either statute intended to leave in the offender an ulterior estate in fee after a forfeited life-estate, or any interest whatever subject to his disposing power. Indeed, forfeiture has frequently been spoken of in the English Courts as equivalent to conveyance. It was in Lord Lovel's Case, Plowd. 488, where it was said by HARPER,

Justice, "The Act (of attainder) is no more than an instrument of conveyance, when by it the possessions of one man are transferred over to another." And again: "The Act conveys it (the land forfeited) to the king, removes the estate out of Lovel, and vests it entirely in the king." In *Burgess v. Wheate*, 1 Eden, 201, in discussing the subject of forfeiture, the Master of the Rolls said, "The forfeiture operated like a grant to the king. The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting. The crown holds in this case as a royal trustee (for a forfeiture itself is sometimes called a royal escheat). . . . If a forfeiture is regranted by the king, the grantee is a tenant *in capite*, and all mesne tenure is extinct." See, also, *Brown v. Waite*, 2 Mod. 133. If a forfeiture is equivalent to a grant or conveyance to the government, how can anything remain in the person whose estate has been forfeited which he can convey to another? No conceivable reason exists why the construction applied to the English statutes referred to should not be applied to our Act of 1862 and the joint resolution. If, in the British statutes, the sole object of the limitation of the duration of forfeiture was a benefit to the heirs of the offender, it is the same in our statutes; and it is a perversion of the intent and meaning of the joint resolution to read it as preserving rights and interests in those who under the Act had forfeited all their estate. What was seized, condemned as forfeited, and sold, in the proceedings against Charles S. Wallach's estate, was not, therefore, technically a life-estate. It is true, that in *Bigelow v. Forrest*, 9 Wall. 339, and *Day v. Micou*, 18 Ib. 156, some expressions were used indicating an opinion that what was sold under the confiscation Acts was a life-estate carved out of a fee. The language was, perhaps, incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide anything respecting the quantity of the estate carved out; and what we said upon the subject had reference solely to its duration.

It is argued on behalf of the defendant, that because under a confiscation sale of land, or of estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere; for it is said that a fee can never be in abeyance; and as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser, whose interest ceases with the life, it must remain in the person whose estate has been seized. The argument is more plausible than sound. It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; and it is, therefore, of no weight in the inquiry what was intended by the Confiscation Act and concurrent resolution. Undoubtedly there are some anomalies growing out of the congressional legislation, as there were growing out of the statutes of 5th and 18th Elizabeth; but it is the duty of the Court to carry into effect what Congress intended, though it must be by denying the applicability of some common-law maxims, the reasons of which have long since disappeared. It has not been found necessary in England to hold that a reversion remained in a traitor after his attain, though the statutes declared that the forfeiture shall be during his natural life only.

We are not, therefore, called upon to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States or in the purchaser, subject to be defeated by the death of the offender whose estate has been confiscated. That it cannot dwell in the offender, we have seen, is evident; for, if it does, the plain purpose of the Confiscation Act is defeated, and the estate confiscated is subject alike in the hands of the United States and of the purchaser to a paramount right remaining in the offender. If he is a tenant of the reversion, or of a remainder, he may control the use of the particular estate; at least, so far as to prevent waste. That Congress intended such a possibility is incredible.

If it be contended that the heirs of Charles S. Wallach cannot take by descent unless their father, at his death, was seised of an estate of inheritance—*e. g.*, reversion or a remainder—it may be answered, that, even at common law, it was not always necessary that the ancestor should be seised to enable the heir to take by descent. Shelley's Case is, that, where the ancestor *might* have taken and been seised, the heir shall inherit: FORTESCUE, J., in *Thornby v. Fleetwood*, 1 Str. 318.

If it were true that, at common law, the heirs could not take in any case where their ancestor was not seised at his death, the present case must be determined by the statute. Charles S. Wallach was seised of the entire fee of the land before its confiscation, and the Act of Congress interposed to take from him that seisin for a limited time. That it was competent to do, attaching the limitation for the benefit of the heirs. It wrought no corruption of blood. In *Lord de la Warre's Case*, 11 Coke, 1 a, it was resolved by the Justices "that there was a difference betwixt disability personal and temporary and a disability absolute and perpetual; as, where one is attainted of treason or felony, that is an absolute and perpetual disability, by corruption of blood, for any of his posterity to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him; but, when one is disabled by Parliament (without any attainder) to claim the dignity for his life, it is a personal disability for his life only, and his heir after his death may claim as heir to him, or to any ancestor above him." There is a close analogy between that case and the present. See, also, *Wheatley v. Thomas*, Lev. 74.

Without pursuing this discussion farther, we repeat, that to hold that any estate or interest remained in Charles S. Wallach after the confiscation and sale of the land in controversy would defeat the avowed purpose of the Confiscation Act, and the only justification for its enactment; and to hold that the joint resolution was not intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death, would give preference to the guilty over the innocent. We

cannot<sup>\*</sup> so hold. In our judgment, such a holding would be an entire perversion of the meaning of Congress.

It has been argued that the proclamations of amnesty after the close of the war restored to Charles S. Wallach his rights of property. The argument requires but a word in answer. Conceding that amnesty did restore what the United States held when the proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy: *Semmes v. United States*, 91 U. S. 21. Besides, the proclamation of amnesty was not made until December 25, 1868.

Decree reversed.

WILLIAMS, R. P. 126; 2 Bl. Comm. 267; *Brown v. White*, 2 Mod. 133; *Bigelow v. Forrest*, 9 Wall. 339; *Day v. Micou*, 18 Wall. 156; Minn. Gen. Laws, 1889, ch. 129, § 4; Const. Minn., Art. I, § 11; Const. U. S., Art. III, § 3.

Forfeiture, as at common law, inflicted as punishment for crime, is unknown in any of the States of the Union: WILLIAMS, R. P. 126, note.

## i

### Title by Marriage.

**Title by marriage is that which a husband and wife respectively acquire in the lands of each other under the law by virtue of their marriage.**

#### RANDALL v. KREIGER.

Supreme Court of the United States, 1874.

23 Wall. 137.

Mr. Justice SWAYNE. There is no controversy between the parties as to the facts.

When the power of attorney was given there was no law of Minnesota authorizing such an instrument to be executed by husband or wife, or the attorney to convey under it.

The validity of the deed as respects Randall, the husband, is not questioned, but its efficacy as to the widow, the appellant in this case, is denied. Her claim to dower is <sup>reversed</sup> restricted upon



several grounds, and among them that the defect in the deed was remedied by the curative Act of 1857.

We have found it necessary to consider only the point just stated.

It is not objected that the Act of 1857, as regards its application to the present case, is in conflict with the Constitution of the State. We have carefully examined that instrument and have found nothing bearing upon the subject.

Nor was the Act forbidden by the Constitution of the United States.

There is nothing in that instrument which prohibits the Legislature of a State or Territory from exercising judicial functions, nor from passing an Act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. Contracts are not impaired, but confirmed by curative statutes.

Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptation of the term, that exists is that the consent of the parties is necessary to create the relation. It is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else. An eminent writer has said it is the basis of the entire fabric of all civilized society.

By the common law, where there was no antenuptial contract, certain incidents belonged to the relation.

Among them were the estate of tenant by the curtesy on the part of the husband if issue were born alive and he survived the wife, and on her part dower if she survived the husband. Dower by the common law was of three kinds: *Ad ostium ecclesiæ*, *Ex assensu patris*, and that which in the absence of the others the law prescribed. The two former were founded in contract. The latter was the creature of the law. Dower *Ad ostium ecclesiæ* and *Ex assensu patris* were abolished in England by a statute of the 3d and 4th William IV, ch. 105. The dower given by law is the only kind which has since existed in England, and it is believed to be the only kind which ever obtained in this country.

During the life of the husband the right is a mere expectancy or possibility. In that condition of things the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be molded according to the will of the Legislature.

Laws upon those subjects in such cases take effect at once, in all respects as if they had preceded the birth of such persons then living. Upon the death of the husband and the ancestor the rights of the widow and the heirs become fixed and vested. Thereafter their titles respectively rest upon the same foundation, and are protected by the same sanctions as other rights of property.

The power of a Legislature under the circumstances of this case to pass laws giving validity to past deeds which were before ineffectual is well settled.

In *Watson v. Mercer* the title to the premises in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of the

30th of May, 1785. It was fatally defective as to the wife in not having been acknowledged by her in conformity with the provision of the statute of Pennsylvania of 1770, touching the conveyance of real estate by *femes covert*. She died without issue. James Mercer died, leaving children by a former marriage. After the death of both parties her heirs sued his heirs in ejectment for the premises and recovered. The Supreme Court of the State affirmed the judgment. In 1826 the Legislature passed an Act which cured the defective acknowledgment of Mary Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the Supreme Court of the State, and the judgment of affirmance was affirmed by this Court. This case is conclusive of the one before us.

To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the Courts the vested right is usually unattended with the slightest equity.

There is nothing in the record persuasive to any relaxation in favor of the appellant of the legal principles which, as we have shown, apply with fatal effect to her case. The curative Act of 1857 has a strong natural equity at its root. It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid.

The purchase-money for the lot became a part of his estate, and the entire estate was given to her at his death. Not satisfied with this she seeks to fasten her dower upon the property in question.

The Act accomplished what a Court of Equity, if called

upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of law as to *femes covert* in such cases would have prevented it. The Legislature thus did what right and justice demanded, and the Act strongly commends itself to the conscience and approbation of the judicial mind.

Decree affirmed.

*Title by curtesy.*

**Title of the husband by curtesy vests upon the death of the wife without any preliminary formality.**

WITHAM *v.* PERKINS.

Supreme Judicial Court of Maine, 1824.

2 Greenl. 400.

One E. Perkins died in 1775, leaving six children inheriting his estate in common, of whom the tenant was one and Lydia P. another. Lydia married David Thompson, to whom was born one child, this demandant. Eight days after the birth of this child the mother died, and David Thompson never went into possession of his wife's lands left by her father to her in common with the other children. The demandant, some forty years after her mother's death, but while her father was living, made an entry and claimed as reversioner her mother's share.

MELLEN, C. J. The demandant is the granddaughter of Eliphalet Perkins, and the tenant is his son, and has been in the open and actual possession of the lands and estate of which the demanded premises are a part, for more more than forty years before the commencement of this action. A short time before it was commenced the demandant made a *formal entry*, and then claimed her share of the estate—in this action she declares on her own seisin—and the questions are—whether she had a *right of entry* and a *right of action* when this suit was commenced—and whether she can have any such right during the life of David Thompson, her father. The jury have decided that the long-continued and actual possession of

the tenant has been as *tenant in common* with the other heirs of Eliphalet Perkins, and so not an adverse possession, and a disseisin of those heirs. It follows that when Mrs. Thompson died in 1784, she died seised, as tenant in common with the other heirs of her father, the tenant's possession being constructively the possession of all his co-tenants. David Thompson, on the death of his wife, became seised, as *tenant by the curtesy*, of the share in common, of which his wife died seised, and for the same reason that the actual possession of the tenant has not been adverse to the right and title of the heirs it has not been adverse to the right and title of Thompson as tenant by the curtesy—and hence also it follows that ever since the death of his wife he has been *constructively* in possession as tenant in common with Perkins, the tenant. This estate of Thompson still continues and his rights have not been impaired by any act on his part, though the tenant has been permitted to occupy and receive the profits of the estate. From this view of the facts of the case and the application of well-known principles to those facts, it plainly results that during the life of David Thompson the tenant by the curtesy, the heirs of his wife can have no right of entry upon the lands, whether in the actual or constructive possession of Thompson himself, or of any other person. The entry, then, of the demandant, made upon the lands previous to the commencement of this action, was *without right*, and proves no lawful seisin sufficient to maintain this action—and being merely a *formal entry*, she thereby gained no title by wrong, in virtue of which she might maintain a writ of entry against the person on whose possession such formal entry was made. It is competent for the tenant to make this defense, and we are of opinion it is sufficient to bar the plaintiff. Let the verdict be set aside and a non-suit be entered.

1 Washburn, R. P., p. 191, § 56; *Watson v. Watson*, 13 Conn. 83.

After birth of child the husband's right is initiate: *Foster v. Marshall*, 2 Foster (N. H.), 491.

It becomes consummate on the wife's death: *Oldham v. Henderson*, 5 Dana, 254.

Curtesy in equitable estate: *Ogden v. Ogden*, 28 S. W. 796.

*Title in dower.*

Though consummate upon the husband's death, the widow cannot enter, nor is her legal title to the freehold perfect so that she can transfer the same, until her dower has been duly assigned.

## MOORE v. HARRIS.

Supreme Court of Missouri, 1887.

91 Mo. 616; 4 S. W. Rep. 439.

SHERWOOD, J. Ejectment for lot 63 in the town of Benton. Both parties claim under Elizabeth Crow, as the common source of title. To show title in himself, the plaintiff, after showing title in Albion Crow, the husband of Elizabeth Crow, by a commissioner's deed, dated October 28, 1845, next offered in evidence a deed from the collector of Scott County, Thomas S. Rhoades, to Elizabeth Crow, dated October 28, 1867, professing to convey to the grantee therein the lot in controversy, as the property of Albion Crow, and as sold because of delinquent taxes.

Plaintiff next offered in evidence a deed for the lot in question, from Elizabeth Crow to himself, dated March 25, 1868, which deed, so far as necessary to copy it here, is as follows: "Know all men by these presents, that I, Elizabeth Crow, of the county of Scott and State of Missouri, have this day, for and in consideration of the sum of seven hundred dollars, to me in hand paid by Joseph H. Moore, of the same county and State, *granted, bargained, and sold*, and by these presents do *grant, bargain, and sell*, unto the said Joseph H. Moore the following described real estate, situate in the county of Scott and State of Missouri; that is to say, the southeast quarter of the northeast quarter of section 14, and the undivided half interest in the west half of the southwest quarter of section 12, in township 28 north, range 13 east, it being forty and undivided half of eighty acres. Also, all the right, title, and interest, which I have of, in, and to lots 91 and 121, in the town of Commerce, in said county of Scott; and also lot 63, in the town of Benton, in said county of Scott."

The next link in the chain of plaintiff's title was a deed to Elizabeth Crow, acknowledged October 29, 1870, executed by plaintiff as administrator of Albion Crow, and conveying the lot in question.

The claim of the defendant Harris is based on a warranty deed for the lot aforesaid, executed November 30, 1877, by Elizabeth Crow to Mary J. Harris, wife of said defendant, Harris.

1. The deed of the collector of Scott County for the lot in dispute, executed to Elizabeth Crow in 1867, was worthless, and conveyed no title, and was void on its face, in consequence of its failing affirmatively to show that all the prerequisites which the law had prescribed, as to the fact of notice having been given of the delinquency of the land for taxes, had been complied with prior to judgment rendered by the County Court; and in consequence of its failing affirmatively to show that advertisement had been made of the intended sale of the land for taxes in the precise method required by the statute. The statements made by the collector in his deed, that these things—these jurisdictional facts—had been done “*according to law*,” or “*in manner and form as directed by law*,” go for nothing in the estimation of the Courts. The *facts done* must, in such cases, be set forth, in order that the *Courts* may determine whether the respective officers and Courts have acted “*according to law*.” *Lagroue v. Rains*, 48 Mo. 536; *Spurlock v. Allen*, 49 Mo. 178; *Large v. Fisher*, Ib. 307.

The bill of exceptions shows that this deed was admitted in evidence despite the objections of the defendants. The judgment for plaintiff, however, recites that it was finally excluded from the consideration of the jury by order of the Court. This recital, if true, should have been preserved by the bill of exceptions, the office of which is to preserve all matters of mere exception. I judge, however, from the first instructions asked by, and refused, the defendants, that the Court did not regard the collector's deed as void on its face. It was thus void, as already seen from the authorities cited, and no title passed to Elizabeth Crow by reason thereof.

2. I now come to consider the effect of the deed to plaintiff of date March 25, 1868, whose recitals have already been in substance set forth; for on this deed plaintiff's paper title exclusively depends. I think it quite too plain for argument that the statutory covenants of "grant, bargain, and sell," do not extend to nor include the lot in question. If this be true, then the deed just mentioned, so far as concerns lot 63, is in effect a bare quit-claim deed, and no after-acquired title of Elizabeth Crow could inure to the benefit of plaintiff. Besides, it already appears that at the time the deed of March 25, 1868, was made, the only title Elizabeth Crow had in the premises was that of a dowress, whose dower remains unassigned. The authorities agree that in such case that the legal title of a dowress does not pass by her deed. The only right or interest thereby passing is one which may be enforced and effectuated in equity: 1 Washb. Real Prop. (4th ed.) 303; 2 Scrib. Dower, 40, 43. Of course, these remarks are not intended to apply to the case of a dowress who releases her dower right to the terretenant, or one in possession of the lands, or to whom she stands in privity of estate: Washb. *supra*; Scrib. Dower, 40.

The only right or interest, therefore, which plaintiff acquired by reason of his deed, as aforesaid, was one vesting in action only, so far as the views of a Court of Law are concerned. What a Court of Equity would do in the premises does not matter, as in this action the plaintiff must recover on the legal title, and not on uneffectuated equities.

3. Nor did the plaintiff gain any title to the premises by reason of the operation of the statute of limitations, since his possession was not adverse and continuous for the requisite statutory period: *Wilson v. Albert*, 89 Mo. 537, 1 S. W. Rep. 209.

As this cause was not tried in conformity to the views here announced, the judgment is reversed, and the cause remanded.

2 Scribner on Dower, 27-35; 1 Washburn, R. P., p. 283, § 3.

Dower is a freehold estate growing out of marriage, seisin, and the death of the husband: *Yale et ux. v. Jay et al.*, 31 Ark. 576.

After marriage and seisin by the husband, the wife's interest in the land is inchoate subject to legislative control; but at the death of the husband



the widow's prior interest becomes a vested right, not subject to legislative modification : *Guerin v. Moore*, 25 Minn. 462.

While inchoate it may be wholly abolished : *Morrison v. Rice*, 35 Minn. 436.

While inchoate it is such an interest in the land that it cannot be the subject of contract between husband and wife : *In re Rausch*, 35 Minn. 291.

Until assignment of dower the widow has not title subject to alienation : *Heisen v. Heisen*, 145 Ill. 658 ; 34 N. E. 597.

### Statutory Modification.

Curtesy and dower have been abolished in some States, and enlarged or otherwise modified in others, so that husband and wife take respectively a one-third or other proportional part of each other's lands in fee simple.

#### ROCKHILL v. NELSON.

Supreme Court of Indiana, 1865.

24 Ind. 422.

GREGORY, J. The plaintiff in this case is the widow, having been the third wife, of William Rockhill, who died seised in fee simple of the land in dispute. He had by the plaintiff one child, which died, in infancy, a short time before his death. The defendants are the children of the deceased husband by a former wife. The widow claims one-third of the land of which her husband died seised, in fee. The defendants insist that she is entitled to a life estate only.

The rights of the parties depend upon the construction to be given to our law of descent.

By the 17th section of that law the surviving widow takes one-third, in fee, of all the lands of which the husband died seised. By the 27th section she takes, as the heir of her husband, one-third, in fee, of all the land owned by the husband *at any time during coverture*, in the conveyance of which she has not joined, and one-third, absolutely, of all equitable estates owned by him at his death. Under these sections the plaintiff would take one-third of the real estate of her deceased husband in fee. The only inquiry will be how and to what

extent does the proviso to § 24 (1 G. & H. 296) affect or modify §§ 17 and 27, the former preceding and the latter following § 24? The proviso is in these words: "*Provided*, that if a man marry a second or other subsequent wife, and has by her no children, but has children *alive* by a previous wife, the land which, at his death, *descends* to such wife, shall, at her death, *descend* to his children."

In an able and well-considered brief, the learned counsel of the appellant argue thus: "The language of this proviso is, in some respects, unmistakably clear. Something descends to the wife. What is it? If anything, it is one-third of her husband's real estate, not a life interest in his real estate. The proviso does not intimate such a thing. If the one-third does not descend to the widow, to whom does it descend? Not to the children or heirs, for by the clear and express words of the proviso they take whatever they may be entitled to, not at the death of the husband and father, but at the death of the widow. They take, not from the father, but from his widow. They take from her, at her death, nothing but what she, as heir of her deceased husband, took at his death. If she takes less than a fee, the children take nothing at all. Prior to the widow's death they can have no interest in the land which descends to her at her husband's death.

"If it shall be said that the widow takes but a life estate, then this clause, which by a strained and unnatural construction is made to reduce the widow's interest from a fee to a life estate, becomes absurd and nonsensical. For it is too clear to admit of doubt, unless words have lost all significance, that it was the purpose of this proviso to cast upon the husband's children, at the death of the widow, whatever she might then possess as the heir of the husband. To give effect to the plain and obvious meaning of this proviso it must be held, we think, that the *whole* interest in one-third of the deceased husband's lands descends, at his death, to his widow. That no part of this interest *then* descends to his children, for the simple reason that it is to descend to them, if at all, at the death of the widow. That it simply prescribes a rule of de-

scent, making the husband's children, in the particular case, the special, substituted heirs of the second or subsequent wife."

This position, so forcibly put, addressed to this Court before the decision in the case of *Martindale v. Martindale*, 10 Ind. 566, would have been entitled to grave consideration; and it is, indeed, difficult to see how it could have been met by legal argument. But there are some questions in law, the final settlement of which is vastly more important than how they are settled; and among these are rules of property, long recognized and acted upon, and under which rights have vested. It must be admitted that our law of descents, among the most important on our statute book, is not remarkable for precision and clearness, and that vexatious questions are often occurring, requiring judicial interpretation of this statute. We cannot change a decision without producing confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if the canon of descent, as settled by the determination of the Court of last resort is unjust, or even distasteful, the Legislature can change the rule by a new statute, without interfering with vested rights. As now constituted, however much we may differ from the opinions of our predecessors, we shall not introduce doubt and confusion in *questions of property* by overruling the previous decisions of this Court. We have had occasion, in the last few months, to overrule a number of cases, but only in that class in which the rulings operate upon the future and not upon the past, and which, in our opinion, will be attended by unmixed good.

The cases of *Martindale v. Martindale*, *supra*, and *Ogle et al. v. Stoops et al.*, 12 Ind. 380, were decided some six or seven years ago, and the rule therein established has been acquiesced in by the Legislature through three general and one special sessions, and ought not now, in our opinion, to be disturbed by this Court.

The judgment is affirmed, with costs.

In Indiana the surviving spouse takes as an *heir*, hence no assignment of the interest is necessary: *Gaylord v. Dodge*, 31 Ind. 41; *Fletcher v. Holmes*, 32 Ind. 510.

Iowa—abolished : *Mock v. Watson*, 41 Iowa, 241.

Illinois—Husband has *dower*, and until assignment his interest is not subject to alienation : *Heisen v. Heisen*, 34 N. E. Rep. 597 ; 145 Ill. 658.

**In some States dower and curtesy have been enlarged to a one-third interest in fee simple, retaining their other essential features.**

HOLMES *v.* HOLMES.

Supreme Court of Minnesota, 1893.

54 Minn. 352.

VANDEBURGH, J. The plaintiff's cause of action is for a divorce on the ground of the adultery of the defendant. In her complaint she demands that she be adjudged to have her dower in defendant's lands as if he were dead, and under this relief she claims to be entitled to hold the homestead of defendant for life, and an equal undivided third of all other lands of which he was during coverture seised, and to be allowed alimony. The Court adjudged the plaintiff entitled to a divorce on the ground stated, and awarded alimony, but refused dower, or the provision in lieu of dower, provided for by the present statute.

There is no doubt that 1878 G. S., ch. 62, § 24, secures to the wife, in the cases specified, an unqualified right to dower in the lands of her husband as if he were dead. By the statute in force when this section was enacted, the widow's right of dower, substantially as at common law, was preserved to her : 1851 R. S., ch. 49, § 1. By Laws 1875, ch. 40, estates in dower *eo nomine*, as then existing, were abolished, and, in lieu thereof, provision was made for a life estate in the homestead of the husband and an undivided one-third of all other lands of which he might die seised. By Laws 1876, ch. 37, and again in the Probate Code, enacted in 1889, the subject is revised, and, with some changes, the provisions of the Act of 1875 are retained, and incorporated under the head of "Title to Real Property by Descent." Now, under § 24, in question, is the rule to be applied as the term "dower" was

used and understood when that section was enacted, or is it to be given an enlarged and extended application, so as to embrace the present liberal provisions for the wife made out of his estate on the death of her husband? Estates in dower have been changed and enlarged in many of the States by legislative enactment (*Noel v. Ewing*, 9 Ind. 46; *Smith's Appeal*, 23 Pa. St. 9; *Beard v. Knox*, 5 Cal. 252); so that it has come to be understood generally as the provision in the nature of dower which the law makes for the wife from the estate of her deceased husband, and it is contingent only upon the seisin of the husband and his death, and beyond his power to divest. The present provisions for the wife, above specified, were clearly intended to be in lieu of dower, and retain its essential features. The interest thereby created is inchoate upon the marriage and seisin, and becomes absolute at his death, and is thus distinguishable from other provisions made for her as heir in certain contingencies. Her estate extends to the homestead and one-third of other lands of which her husband is seised during coverture, and cannot be divested without her consent. Unless it be held that any material change in the law of dower as it stood when 1878 G. S., ch. 62, § 24, was enacted would operate as a repeal of that section, or make it inoperative, we are of the opinion that the term "dower" therein must be interpreted to extend to the present statutory provisions referred to. The estate under consideration, thus created for the benefit of the wife, has always since the Act of 1875 been treated by this Court as in the nature of dower, and governed by the same rules of legal construction: *In re Gotzian*, 34 Minn. 159 (24 N. W. Rep. 920); *In re Rausch*, 35 Minn. 293 (28 N. W. Rep. 920); *McGowan v. Baldwin*, 46 Minn. 479 (49 N. W. Rep. 251); *Dayton v. Corser*, 51 Minn. 406 (53 N. W. Rep. 717). When, therefore, a divorce is ordered for the cause of adultery committed by the husband, the wife will be entitled to dower, as provided by the present statutes on the subject, as if he were dead. The decree of divorce will establish her right to the estate, but we do not think the statute contemplates that it should be set

off or assigned to her in the divorce proceedings. Nor would such decree be the basis of a writ of assistance to put her in possession (2 Bish. Mar. & Div., ed. 1801, §§ 1522, 1639); but, if possession is denied her, she can recover it, and will be entitled to partition as in other cases. As she was not entitled to such relief in this action, the judgment must be affirmed.

An undivided one-third of his lands "descends to" and becomes "vested in" the widow on the death of the husband: *In re Gotzian*, 34 Minn. 159.

It would seem that the widow's title becomes perfect and alienable on the death of the husband, without a formal assignment, although a partition may be necessary: *Holmes v. Holmes*, *supra*. See, also, *In re Rausch*, 35 Minn. 291; *McGowan v. Baldwin*, 46 Minn. 479; *Dayton v. Corser*, 51 Minn. 406.

## j

### Execution.

**Title may be transferred by sale on execution, but it does not pass to the purchaser, in some States, until the time to redeem expires.**

#### LINDLEY v. CROMBIE.

Supreme Court of Minnesota, 1883.

31 Minn. 232.

GILFILLAN, C. J. Taylor, in 1876, caused real estate to be sold on execution in his favor, and became the purchaser. Before the time for redemption expired, he executed a deed to Baldwin, whereby he did "grant, bargain, sell, release, and quit-claim" to him "all right, title, interest, claim, or demand in or to" the real estate. There was no redemption, and the question is, in whom, in Taylor or in Baldwin, did the title vest at the end of the time for redemption? The statute provides (Gen. St. 1878, c. 66, § 322), that, at the end of the time for redemption, the certificate of sale shall operate as a conveyance "to the purchaser or his assigns" of all the right, title, and interest of the person whose property is sold, in and to the same, at the date of the lien upon which the same was sold. From this it is apparent—*First*, that the title of the

debtor does not pass until the time to redeem expires; *second*, that, notwithstanding such title does not pass at once on the sale, yet the purchaser acquires by the incomplete sale a right which, by whatever name it may be called, is assignable; and *third*, that if such right is assigned, the title, when it passes by lapse of time and non-redemption, vests, by virtue of the statute, in the *assign* of such right.

The decisions of this Court are to the effect that the title of the mortgagor or judgment debtor does not pass to the purchaser till the time to redeem expires: *Daniels v. Smith*, 4 Minn. 117 (172); *Donnelly v. Simonton*, 7 Minn. 110 (167); *Horton v. Maffitt*, 14 Minn. 216 (289); *Loy v. Home Ins. Co.*, 24 Minn. 315. In some of these cases, the language in the opinions used to express this goes further, and indicates that till then the purchaser acquires no rights or interests that he can convey. This language may have had, and probably has had, the effect to mislead as to what was really decided. But none of them holds that he does not acquire a right which he can assign.

If, in this case, the description in the deed is sufficient to include such a right, it passed by the deed to Baldwin, and the title of the debtor passed to him when the time to redeem expired. Is it a right, interest, claim, or demand in or to the land sold? It certainly is not a claim against any person, nor right or interest to or in anything other than the land. The statute (Gen. St. 1878, c. 66, § 327), treats it as some sort of interest in land. "The interest acquired upon any sale is subject to the lien of any attachment or judgment duly made or docketed against the person holding the same, as in the case of real property, and may be attached or sold upon execution in the same manner." The vendee in a recorded contract to convey real estate has, in law, no title or estate in the land; he has only a right that the title shall be vested in him according to the terms of the contract. Could any one claim that the deed of such vendee, in the terms of this deed, would not show an intent to pass the vendee's right under the contract, especially if it were the only right he had with respect to the

land? We think not. Nor do we see how it can be claimed that Taylor's deed does not show an intent to pass a somewhat similar right, a right to have the title vest in him by lapse of time, if not prevented by redemption.

Judgment reversed, and let the Court below enter judgment for the defendant.

Title passes on execution at the end of the time for redemption: *Parke v. Hush*, 29 Minn. 434. Formerly it passed on the day of sale: *Dickinson v. Kinney*, 5 Minn. 409.

## k

### Title by Judicial Decree.

Title to land may be transferred from one person to another by judicial action; as, in foreclosure proceedings, bankruptcy, or by probate proceedings, as in case of executors, administrators, and guardians.

#### *Mortgage Foreclosure.*

The Court may, at the request of the purchaser at the foreclosure sale, or of his assigns, vest the title by final decree in any person the applicant may name.

DODGE *v.* ALLIS.

Supreme Court of Minnesota, 1880.

27 Minn. 376.

GILFILLAN, C. J. Appeal from what the statute (Gen. St. 1866, c. 81, § 33; Gen. St. 1878, c. 81, § 36,) designates a final decree in an action to foreclose a mortgage. The objection is made by motion to dismiss, that an appeal will not lie from such a decree; or, if one will lie, it must be taken as from an order—within thirty days. Whether it is to be deemed a judgment or order, inasmuch as legal rights are or may be determined by it, there is undoubtedly a right of appeal; and, although it is not designated as a judgment but as a decree, as it has in its effect upon the matters determined by it, and in the mode of its entry, all the essentials of a judg-



ment, it should be appealed from as such. The motion to dismiss is denied.

An important question in the case is, can this Court, upon an appeal from the so-called "final decree," consider alleged errors in the judgment directing the sale, or must an appeal from that judgment be brought to secure a review of it? This must depend on the question which is to be deemed the final judgment determining the action, and settling the rights of the parties to it. The question is not difficult to answer. The judgment directing the sale (Gen. Stat. 1866, c. 81, § 26; Gen. St. 1878, c. 81, § 29,) adjudges the amount due, with costs and disbursements, and the sale of the mortgaged premises or some part thereof to satisfy said amount, and directs the sheriff to proceed and sell the same, etc. This judgment determines all the issues in the action, and provides just the relief to which the plaintiff is entitled. When it is entered, all controversy as to the respective rights between the plaintiff and the several defendants with respect to the mortgage and the right to enforce it is determined. All that follows it—the sale, report of sale, confirmation, etc.—are merely to carry into effect and enforce the determination of the rights of the parties which the judgment makes. The "final decree" does not determine any issue, nor any of the merits between the parties, nor adjudicate any of the rights between them as parties, nor contain any provision which affects the relief to which the plaintiff is entitled. Before it can be entered, plaintiff must have got all the relief he is entitled to in the action. The property has been sold, and the proceeds are presumed to have been applied as directed by the judgment. It is not a judgment upon the matters involved in the action. The application for the decree and the entering of it, though done in the action, is not a proceeding between the plaintiff and the defendants or any of them, or between any of the parties to the action, as parties. It is a proceeding on behalf of the purchaser, whoever he may be, as purchaser. The decree is for his benefit, and not for the benefit of any party to the action. Any controversy which may arise on the appli-

cation must be between him and one or more of the parties. No controversy between the parties to the action, in their character of such parties, can then be determined. The provision for such a "final decree" may at first sight seem singular, yet it is undoubtedly a wise provision. It is intended to determine in the original action, as between the purchaser and all the parties to the judgment for the sale, that there has been no redemption, and to afford to the purchaser record evidence in the way of a decree or judgment, conclusive as to all the parties, that the title is in the purchaser free from any right to redeem. On an appeal from the "final decree" no error can be alleged against the judgment for a sale. To review that judgment an appeal must be taken from it.

The judgment for the sale was entered November 6, 1876, the sale under it made December 23, 1876, and the report of sale was confirmed January 6, 1877. As appears by the report, the plaintiffs in the action were the purchasers. Application by the plaintiffs for the final decree was noticed for October 28, 1879, long after all rights of redemption were barred by lapse of time. The decree was entered the same day. The decree is, of course, taken to be correct; a party seeking to reverse it must show that it is erroneous, and that the error prejudices him.

The defendant Allis, appellant here, alleges it to be erroneous, in that it adjudges the title to be in defendant Davidson, who was not the purchaser; and it does not appear that he was the assignee of the purchaser. The decree was entered on the motion of the plaintiffs, who were the purchasers. So far as appears, they were the only persons who then had any interest in the title which passed by the sale. If they consented that the title should, nevertheless, be vested by the decree in any other person, it was a matter between them and such person. It is not apparent how any other party to the action, whose right of redemption was then barred, could be prejudiced by it. Appellant claims that, to justify the decree in vesting the title in Davidson there must have been an assignment to him from the purchaser, and that such assign-

ment to him, he being the debtor and mortgagor, would have operated as in favor of appellant, his grantee of an undivided half of the property subsequent to the mortgage, as a redemption from the sale; and in that case a decree vesting the entire title in Davidson as against him could not be entered, and the entering it was therefore error prejudicial to him. This argument rests, not on a state of facts shown by the record, but one which has only assumption and conjecture to sustain it. First, it does not appear that, prior to the actual entry of the decree, there was anything between plaintiffs and Davidson in the nature of an assignment. Further, if that had appeared, there was nothing to show it was made at such a time that it would take effect as a redemption, nor is there anything to show that Davidson owed Allis any duty to redeem. In the pleadings between plaintiffs and Allis in the action to foreclose, a conveyance of an undivided half of the property by Davidson to him, subsequent to the mortgage, is alleged by Allis in his answer, and admitted by plaintiffs in their motion for judgment. But that did not conclude Davidson, nor would the answer of Allis and the admission of plaintiffs be evidence of the fact as against him. In that action no issue of the kind was tendered to him, and no situation of the action prior to the judgment for sale occurs to us in which it could be, so that it could be litigated and determined between them.

It is also objected that the notice of application for the decree was given by plaintiffs, and that under that notice only a decree vesting the title in them, and not one vesting it in some one else, could be entered. The purchaser or his assigns should make the application, and, of course, he must give the notice. A notice by one not holding, at the time of serving it, that position, would not do. Whether, upon his assigning after the notice, the proceeding would have to drop and be renewed by the assignee, or the application could still be made by the party serving the notice, for the benefit of his assignee we did not find it necessary to determine. But we see no reason why, the notice and application being served and made

by the right person, he may not on the hearing request a decree vesting the title in any one he may name, and the decree be so entered—certainly, so far as the other parties in the action, in their character as such parties, are concerned.

Decree affirmed.

Minn. Gen. Stats. 1878, ch. 81, § 36.

The District Court has power to pass title to real estate by judgment, without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgments into effect; and such judgment being recorded in the office of the register of deeds of the county where such real estate is situated, shall, while in force, be as effectual to transfer the same as a deed of the defendant: Gen. Stats. Minn. 1878, p. 818, § 32.

## 1

### Bankruptcy.

**The rule *caveat emptor* applies at judicial sales, both as to the title and the condition of the property.**

BARRON v. MULLIN.

Supreme Court of Minnesota, 1875.

21 Minn. 374.

GILFILLAN, C. J. Henry Chaffee, Charles L. Snyder, and this defendant were copartners, and in their copartnership business owned and used real and personal property. Snyder died, and after his death Chaffee brought suit against this defendant and Margaret Snyder, the widow and administratrix, and Harriet Snyder, the sole heir of the deceased partner, to close up the partnership affairs. By the judgment in that suit this plaintiff was appointed receiver, and directed to sell all the real and personal property of the firm, and, pursuant to that direction, he offered for sale at auction, and sold, in one parcel, as the property of the firm, Lots 2, 3, 4, and 5, Block 75, in the town of Faribault, with the buildings, machinery, etc. This defendant purchased, at the price of \$6,800, two-thirds to be paid down, and the other third to be paid in one year, with

interest at the rate of seven per cent. per annum, and to be secured by mortgage on the property. The receiver made his report of sale, specifying the above as the property sold, and the price and terms, and, on the stipulation of all the parties to the suit, the report was confirmed. The receiver tendered a deed, and demanded performance by defendant, which he refused. Upon these facts the complaint is based, and demands judgment for \$6,800, with interest from April 1, 1873, the date of the tender of the deed. The Court below directed a verdict for the \$6,800, with interest from that date at seven per cent. per annum, and the jury found accordingly.

On the trial the defendant asked leave to amend his answer and set up certain matters of defense not previously pleaded. The application was denied. It was addressed to the sound discretion of the Court, and we see no reason to think that the discretion was not properly exercised.

The defendant insisted, at the trial, that the receiver was not authorized by the judgment to sell Lot 2. He did not claim that it was not the property of the firm; the answer admits that it was. The judgment did not specifically describe the property to be sold, but directed a sale of all the real estate of the firm, which is sufficient authority to sell Lot 2, if, as is not denied, that lot belonged to the firm. And the fact that the complaint, in describing the property of the firm, does not mention Lot 2, does not control the judgment.

He also insisted that, in the parcel offered for sale and sold by the receiver, and bought by him for the \$6,800, there was a piece other than the four lots described, and that such other piece was not included in the deed tendered by the receiver. This might have been a good defense, as a man is not obliged to receive any other than the precise property which he purchased, had it not been for the confirmation of the report of sale. The report specifies, as sold to defendant, only Lots 2, 3, 4, and 5. The defendant might have opposed, and, if he claimed that it was incorrect, he ought to have opposed the confirmation of the report. As he acquiesced in it, he is deemed to have adopted it, and is bound by the order of the Court con-

firming it: *Smith v. Arnold*, 5 Mason, 414, 420; and this is especially so after the report has been confirmed, pursuant to his written consent that it shall be.

The defendant objects to comply with the terms of his purchase on the further ground that the widow of Snyder has a vested right of dower in an undivided one-third of the property, and the wife of Chaffee an inchoate right of dower in an undivided third, and that the receiver did not procure any release of those rights. The rule *caveat emptor* applies to purchasers at judicial sales: *Bashore v. Whisler*, 3 Watts, 490; *Fox v. Mensch*, 3 Watts & Serg. 444; *King v. Gunnison*, 4 Pa. St. 171; *England v. Clark*, 4 Scam. 486. The purchaser at such sales knows that nothing can be sold, except the interest of the parties to the suit, and it is for him to ascertain, before purchasing, what that interest is.

This rule applies not only in respect to the title, but to the condition of the property. The defendant alleges in his answer, that, during the winter prior to the sale, the roof of the building had, by the action of frost, snow and ice thereon, become, and at the time of the sale and confirmation was, wholly ruined and destroyed, and that at the time of the sale he was ignorant of such condition, and that at such times, by reason of the snow and ice, it was impossible for him to ascertain such condition. No fraud or misrepresentations were alleged. Under the rule *caveat emptor* this is no defense, in whole or in part, to the suit for the price bid.

Two-thirds of the price bid was to be paid at once. The other third was, by the terms of the sale, to be paid in one year. The suit was brought before the year expired, and it insisted that plaintiff cannot, in this suit, recover that third. Where property is sold, to be paid for at a future time, no suit can, as a general thing, be brought on the promise to pay, till the time stipulated; but where the purchaser agrees to give security for the deferred payment, and fails to do so, a suit may be maintained for breach of the agreement to give the security; and in such action the damages are the value of the security agreed upon—*prima facie*, the amount of the sum to be secured:

Rinehart *v.* Olwine, 5 Watts & Serg. 157; Hanna *v.* Mills, 21 Wend. 90.

In this case the plaintiff was entitled to recover two-thirds of the price bid, because it was payable at once, and a sum equal to the other third, because it is presumed that the security, if given as agreed upon, would have been worth that to plaintiff.

The order denying a new trial is affirmed.

### III

#### Administrators and Executors.

CURRAN *v.* KUBY.

Supreme Court of Minnesota, 1887.

37 Minn. 330.

VANDEBURGH, J. There seems to be no basis for this appeal. The action is brought to set aside an administrator's sale and subsequent conveyances, and all proceedings in the Probate Court upon which the sale was founded. The proceedings are upon their face admitted to be regular, and in conformity with the statute. There is no question raised as to the regularity of the appointment of the administrator, or that he was in fact licensed to sell the property in controversy at private sale, in pursuance of the provisions of the General Statutes (as amended by Laws 1881, c. 43), by the Probate Court having jurisdiction; and it does not appear that the order of license to sell required that notice of sale should be given. The administrator also gave the bond and took the oath required by law, and it is not alleged or pretended that the premises were not sold as required by law, or that the present holders did not purchase them in good faith. But two points are made.

The first, in respect to the notice of sale, is already disposed of. No notice was required in the case of a private sale, unless expressly directed.

2. The plaintiff claims that the demurrer admits that there were in fact no debts against the estate, though proved before the Court, and that the petition of the administrator for license to sell the real estate was false in that respect, also that the order to show cause was never served upon the persons interested in the estate, and that the record reciting and showing such service is also false.

(a) These matters were, however, each adjudicated and determined by the Probate Court, on the return-day of the order, upon the allegations and proofs as shown by the record. As to these questions, the record imports verity: *Davis v. Hudson*, 29 Minn. 27 (11 N. W. Rep. 136).

(b) The Court had acquired jurisdiction of the estate, and the administration thereof, and still retained it. The sale could not, therefore, be attacked for irregularities, omissions, or errors, in the proceedings which culminated in the license: *Rumrill v. First Nat. Bank*, 28 Minn. 202 (9 N. W. Rep. 731). In the case cited the petition for license was defective in several particulars; for instance, it showed no debts of the intestate. But it was held that under the provisions of Gen. St. 1878, c. 57, § 51, the sale could not be avoided for such cause. The same rule is applicable to this case.

Order affirmed.

*McGowan v. Baldwin*, 46 Minn. 477; *Streeter v. Wilkinson*, 24 Minn. 288.

## II

### Guardian's Sale.

WEST DULUTH LAND CO. *v.* KURTZ.

Supreme Court of Minnesota, 1891.

45 Minn. 380.

MITCHELL, J. Action to determine adverse claim to real property situated in St. Louis County. The defendants claim title as heirs-at-law of one George Leidner, who died in 1860,



intestate, and seised of the property in controversy. The plaintiff claims title from the same source, under a sale by the guardian of the defendants (then minors) under a license from the Probate Court of St. Louis County. The guardian who made this sale was the mother of the defendants, who was appointed by the Probate Court of that county March 2, 1872, the defendants being residents of Wisconsin, where they lived with their mother. The defendants assail the validity both of the appointment of the guardian and of the sale itself. The ground of attack upon the appointment of guardian is that the Probate Court in Minnesota had no jurisdiction to appoint a general guardian for non-resident minors. That the Court had no jurisdiction to appoint a guardian of the persons of non-resident minors is unquestionably true, but it is equally true that the statute authorizes a Probate Court to appoint a guardian of any estate which a non-resident minor may have in this State, and the validity of such statutes is well settled. Jurisdiction to appoint a guardian exists as well when the infant has property in the State where the jurisdiction is sought to be exercised as when he is domiciled therein. It rests upon a like basis in both cases, viz., the right and duty of a government to take care of minors, as respects either person or property. The fact that the appointment in this case was too broad, to wit, over both person and estate, did not render it invalid in respect to the estate which the minors had within the jurisdiction of the Court: *Davis v. Hudson*, 29 Minn. 27 (11 N. W. Rep. 136). The contention of defendants, that a guardian of the estate of the minors within the State could only be appointed after a general guardianship in the State of the domicile, and as ancillary thereto, is wholly incorrect. The statute imposes no such condition, and it would be of doubtful constitutionality if it did.

2. This brings us to the grounds of attack against the sale itself. No defects or irregularities will invalidate the sale, unless they go to one or more of the five essentials specified in Gen. St. 1878, c. 57, § 51. The record in this case shows that the guardian was licensed to make this sale by the Probate

Court by which she was appointed and in the county in which the land was situated ; consequently it was the Court "having jurisdiction." Also that the guardian gave a bond, which was approved by the Judge of Probate, and took the oath prescribed by statute. This oath having been found among the regular files of the Probate Court, the fact that the Judge had omitted or neglected to indorse upon it the fact and date of its filing was not material. There is no proof, and there is no presumption, that the oath was spurious or that it was surreptitiously placed in the files after the sale. It shows by its date that it was made before. We fail to discover any defects, or even irregularities, in the notice of the time and place of sale. All that the statute requires is that the notice be posted and published for three weeks next before the sale. The guardian's report of sale, which was verified, states in detail a compliance with every requirement both of statute and of the license to sell, and a sale according to the notice at public auction, and the sale was duly confirmed by the Court. These seem to cover the whole ground, so as to leave no available objection to the sale in this collateral action.

We have made no reference to the alleged insufficiency of the notice of the hearing of the application for license to sell, for, even if the sale could be avoided on any such ground, the objections to the notice seem to be based upon the misapprehension of counsel that the statute required it to be published six weeks instead of only four, as the fact is.

What we have said renders it unnecessary to consider the effect or applicability of the statute of limitations (Laws 1889, c. 46, § 204) invoked by plaintiff.

Judgment affirmed.

*Dawson v. Holmes*, 30 Minn. 107 ; *Menage v. Jones*, 40 Minn. 254 ; *Richardson v. Folwell*, 49 Minn. 210 ; *Burrell v. Railway Co.*, 43 Minn. 363 ; *White v. Iselin*, 26 Minn. 487.

## 2

## BY ACT OF PARTIES.

**Title acquired by act of parties is of two kinds: (1) By grant, public or private; (2) by devise.**

## a

**Public Grant.**

**Title by public grant is that derived from the government, either national or state.**

*National.*

## MOORE v. ROBBINS.

Supreme Court of the United States, 1877.

96 U. S. 530.

Mr. Justice MILLER. This case is brought before us by a writ of error to the Supreme Court of the State of Illinois.

In its inception, it was a bill in the Circuit Court for De Witt County, to foreclose a mortgage given by Thomas I. Bunn to his brother Lewis Bunn, on the south half of the southeast quarter and the south half of the southwest quarter of section 27, township 19, range 3 east, in said county. In the progress of the case, the bill was amended so as to allege that C. H. Moore and David Davis set up some claim to the land; and they were made defendants, and answered.

Moore said that he was the rightful owner of forty acres of the land mentioned in the bill and mortgage, to wit, the southwest quarter of the southwest quarter of said section, and had the patent of the United States giving him the title to it.

Davis answered that he was the rightful owner of the southeast quarter of said southwest quarter of section 27. He alleges that John P. Mitchell bought the land at the public sale of lands ordered by the President for that district, and paid for it, and had the receipt of the register and receiver, and that it was afterward sold under a valid judgment and

execution against Mitchell, and the title of said Mitchell came by due course of conveyance to him, said Davis.

It will thus be seen, that, while Moore and Davis each assert title to a different forty acres of the land covered by Bunn's mortgage to his brother, neither of them claim under or in privity with Bunn's title, but adversely to it.

But as both parties assert a right to the land under purchases from the United States, and since their rights depend upon the laws of the United States concerning the sale of its public lands, there is a question of which this Court must take cognizance.

As regards Moore's branch of the case, it seems to us free from difficulty.

The evidence shows that the forty acres which he claims was struck off to him at a cent or two over \$2.50 per acre, at a public land sale, by the officers of the land district at Danville, Ill., November 15, 1855; that his right to it was contested before the register and receiver by Bunn, who set up a prior pre-emption right. Those officers decided in favor of Bunn; whereupon Moore appealed to the Commissioner of the General Land Office, who reversed the decision of the register and receiver, and on this decision a patent for the land was issued to Moore, who has it now in his possession.

Some time after this patent was delivered to Moore, Bunn appealed from the decision of the Commissioner to the Secretary of the Interior, who reversed the Commissioner's decision and confirmed that of the register and receiver, and directed the patent to Moore to be recalled, and one to issue to Bunn. But Moore refused to return his patent, and the Land Department did not venture to issue another for the same land; and so there is no question but that Moore is vested now with the legal title to the land, and was long before this suit was commenced. Nor is there, in looking at the testimony taken before the register and receiver, and that taken in the present suit, any just foundation for Bunn's pre-emption claim. We will consider this point more fully when we come to the Davis branch of the case.

Taking this for granted, it follows that Moore, who has the legal title, is in a suit in chancery decreed to give it up in favor of one who has neither a legal nor an equitable title to the land.

The Supreme Court of Illinois, before whom it was not pretended that Bunn had proved his right to a pre-emption, in their opinion in this case place the decree by which they held Bunn's title paramount to that of Moore on the ground that to the officers of the Land Department, including the Secretary of the Interior, the Acts of Congress had confided the determination of this class of cases; and the decision of the secretary in favor of Bunn, being the latest and the final authoritative decision of the tribunal having jurisdiction of the contest, the Courts are bound by it, and must give effect to it: *Robbins v. Bunn*, 54 Ill. 48.

Without now inquiring into the nature and extent of the doctrine referred to by the Illinois Court, it is very clear to us that it has no application to Moore's case. While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the Executive Department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public land; and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is sub-

ject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the Courts of Justice present the only remedy. These Courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course.

"A patent," says the Court, in *United States v. Stone*, 2 Wall. 525, "is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England, this was originally done by *scire facias*; but a bill in chancery is found a more convenient remedy." See, also, *Hughes v. United States*, 4 Wall. 232; s. c. 11 How. 552.

If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is abso-

lutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.

If such a power exists, when does it cease? There is no statute of limitations against the government; and if this right to reconsider and annul a patent after it has once become perfect exists in the Executive Department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded.

The order of the Secretary of the Interior, therefore, in Moore's case, was made without authority, and is utterly void, and he has a title perfect both at law and in equity.

The question presented by the forty acres claimed by Davis is a very different one. Here, although the government has twice sold the land to different persons and received the money, it has issued no patent to either, and the legal title remains in the United States. It is not denied, however, that to one or the other of the parties now before the Court this title equitably belongs; and it is the purpose of the present suit to decide that question.

The evidence shows that on the same day that Moore bought at the public land sale the forty acres we have just been considering, Mitchell bought in like manner the forty acres now claimed by Davis; to wit, November 15, 1855. He paid the sum at which it was struck off to him at public outcry, and received the usual certificate of purchase from the register and receiver. On the 20th day of February, 1856, more than three months after Mitchell's purchase, Thomas I. Bunn appeared before the same register and receiver, and asserted a right, by reason of a pre-emption commenced on the 8th day

of November, 1855, to pay for the south half of the southwest quarter and the south half of the southeast quarter of section 27, which includes both the land of Moore and Davis in controversy in this suit, and to receive their certificates of purchase. They accepted his money and granted his certificate. A contest between Bunn on the one side, and Moore and Mitchell on the other, as to whether Bunn had made the necessary settlement, was decided by those officers in favor of Bunn ; and on appeal, as we have already shown, to the commissioner, this was reversed, and finally the Secretary of the Interior, reversing the commissioner, decided in favor of Bunn. But no patent was issued to Mitchell after the commissioner's decision, as there was to Moore ; and the secretary, therefore, had the authority, undoubtedly, to decide finally for the Land Department who was entitled to the patent. And, though no patent has been issued, that decision remains the authoritative judgment of the department as to who has the equitable right to the land.

The Supreme Court of Illinois, in their opinion in this case, come to the conclusion that this final decision of the secretary is not only conclusive on the department, but that it also excludes all inquiry by Courts of Justice into the right of the matter between the parties.

The whole question, however, has been since that time very fully reviewed and considered by this Court in *Johnson v. Towsley*, 13 Wall. 72. The doctrine announced in that case, and repeated in several cases since, is this :

That the decision of the officers of the Land Department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department ; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in Courts of Justice, when the title afterward comes in question. But that in this class of cases, as in all others, there exists in the Courts of Equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those



officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief.

In the recent case of *Shepley et al. v. Cowan et al.*, 91 U. S. 340, the doctrine is thus aptly stated by Mr. Justice FIELD: "The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the Courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

Applying to the case before us these principles, which are so well established and so well understood in this Court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the Land Department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it.

In the recent case of *Atherton v. Fowler* (*supra*, page 513), we had occasion to review the general policy and course of the government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the government the highest price which the land would bring by offering it publicly at competitive sales, before a right to any part of it could be established by private sale or by pre-emption. In the enforcement of this policy, the Act of September 14, 1841, which for the first time established the general principle of pre-emption, and which has remained the basis of that right to this day, while it allowed persons to make settlements on the public lands as

soon as the surveys were completed and filed in the local offices, affixed to such a settlement two conditions as affecting the right to a pre-emption. One of these was that the settler should give notice to the land office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the fourteenth section of that Act :

“This Act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the proclamation of the President, nor shall any of the provisions of this Act be available to any person who shall fail to make the proof of payment and file the affidavit required, before the commencement of the sale aforesaid :” 5 Stat. 457.

There can be no misconstruction of this provision, nor any doubt that it was the intention of Congress that none of the liberal provisions of that Act should stand in the way of a sale at auction of any of the public lands of a given district where the purchase had not been completed by the payment of the price before the commencement of the sales ordered by the President's proclamation. We do not decide, because we have not found it necessary to do so, whether this provision is applicable under all the pre-emption laws passed since the Act of 1841, though part of it is found in the Revised Statutes, § 2282, as part of the existing law. But we have so far examined all those laws enacted prior to November, 1855, the date of Mitchell's purchase, as to feel sure it was in full operation at that time. The Act of March 3, 1853, extending the right of pre-emption to the alternate sections, which the government policy reserved in its numerous grants to railroads and other works of internal improvement, required the pre-emptor to pay for them at \$2.50 per acre, before they should be offered for sale at public auction : 10 Stat. 244. This was only two years and a half before these lands were sold to Mitchell, and they were parts of an alternate section reserved in a railroad grant. That statute, in its terms, was limited to persons who had already settled on such alternate sections,

and it may be doubted whether any right of pre-emption by a settlement made afterward existed under the law. But it is unnecessary to decide that point, as it is beyond dispute that it required in any event that the money should be paid before the land was offered for sale at public auction.

The record of this case shows that, while Bunn's pre-emption claim comes directly within the provisions of both statutes, they were utterly disregarded in the decision of the Secretary of the Interior, on which alone his case has any foundation.

We have no evidence in this record at what time the President's proclamation was issued, or when the sales under it began at which Mitchell purchased. These proclamations are not published in the statutes as public laws, and this one is not mentioned in the record. But we know that the public lands are never offered at public auction until after a proclamation fixing the day when and the place where the sales begin. The record shows that both Moore and Mitchell bought and paid for the respective forty-acre pieces now in contest, at public auction. That they were struck off to them a few cents in price above the minimum of \$2.50, below which these alternate sections could not be sold, and that this was on the 15th day of November, 1855. These public sales were going on then on that day, and how much longer is not known, but it might have been a week, or two weeks, as these sales often continue open longer than that.

Bunn states in his application, made three months after this, that his settlement began on the 8th of November, 1855. It is not apparent from this record that he ever gave the notice of his intention to pre-empt the land, by filing what is called a declaration of that intention in the land office. There is a copy of such a declaration in the record accompanying the affidavit of settlement, cultivation, and qualification required of a pre-emptor, which last paper was made and sworn to February 20, 1856, when he proved up his claim, and paid for and received his certificate. There is nothing to show when the declaration of intention was filed in the office.

Waiving this, however, which is a little obscure in the

record, it is very clear that Bunn "failed to make proof of payment, and failed to file the affidavit of settlement required, before the commencement of the sale" at which Mitchell bought. The statute declares that none of the provisions of the Act shall be available to any person who fails to do this. The affidavit and payment of Bunn were made three months after the land sales had commenced, and after these lands had been sold.

The section also declares that the Act shall not delay the sale of any public land beyond the time which has been or may be appointed by the proclamation of the President. To refuse Mitchell's bid on account of any supposed settlement, even if it had been brought to the attention of the officers, would have been to delay the sale beyond the time appointed, and would, therefore, have been in violation of the very statute under which Bunn asserts his right.

Whatever Bunn may have done on the 8th of November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction, unless he had also paid or offered to pay the price before the sales commenced.

It seems quite probable that such attempt at settlement as he did make was made while the land sales were going on, or a few days before they began, with the purpose of preventing the sale, in ignorance of the provision of the statute which made such attempt ineffectual.

At all events, we are entirely satisfied that the lands in controversy were subject to sale at public auction at the time Moore and Mitchell bid for and bought them; that the sale so made was by law a valid one, vesting in them the equitable title, with right to receive the patents; and that the subsequent proceedings of Bunn to enter the land as a pre-emptor were unlawful and void.

It was the duty of the Court in Illinois, sitting as a Court of Equity, to have declared that the mortgage made by Bunn, so far as these lands are concerned, created no lien on them, because he had no right, legal or equitable, to them.

The decree of the Supreme Court of that State must be reversed, and the cause remanded to that Court for further proceedings in accordance with this opinion ; and it is so ordered.

Smelting Co. *v.* Kemp, 104 U. S. 636.

Patent takes effect from date of issuance, not from delivery : *Innes v. Crawford*, 2 Bibb. 412 ; *Smelting Co. v. Kemp*, *supra*.

### *State.*

**Title by private grant is that which a person acquires by voluntary transfer from another by means of a deed.**

#### CHILES *v.* CONLEY'S HEIRS.

Court of Appeals of Kentucky, 1834.

2 Dana, 21.

Chief Justice ROBERTSON. On a joint and several demise in the name of Arthur Conley's heirs, two of the lessors (now appellees) obtained a verdict and judgment, in ejectment, against William Chiles and others claiming under him, for two undivided seventh parts of a tract of land.

Chiles claimed the land in virtue of a conveyance to him, in 1816, by the heirs of William Hays, who was a patentee, and he also held a deed from some of the lessors, but not from either of those who obtained the judgment.

The precise sources, character, and extent of the claim of the appellees, do not clearly appear ; but we may infer that they rely chiefly on a conveyance from William Hays, the patentee, to one Taylor, in 1793, for a part of the land in controversy, and a deed from Taylor to themselves, in 1825 ; a paper purporting to be a deed from one Bridges to their ancestor, in 1806, for another portion of the land ; a sale by the same patentee (Hays) to Bridges, in 1704, and continuous occupancy, under those contracts, from their dates, for a period exceeding twenty, but less than thirty years.

In revising the judgment, the following points only will be specially noticed :

1. On the trial, the Circuit Court refused to permit the

appellants to read the record of a suit in chancery which had been prosecuted by the lessors against the appellant, Chiles, and against the heirs of William Hays and of Bridges and others, for adjusting the title to the land for which this suit was brought; and that decision by the Circuit Judge is now complained of as erroneous.

This Court need not decide whether every part of the record was so totally irrelevant as, on that ground, to be inadmissible as evidence in this case. Whether there is anything in any part of it, that could operate in any way in counteracting any presumption of a conveyance from William Hays to Bridges, or whether, in other respects, it should tend, in any degree, to affect the claim of the appellees, are questions which we shall not consider; because, however the record, if any portion of it were admissible, might operate, there being much of it that would be illegal and irrelevant, the Circuit Court did not err in refusing to admit the record as offered, even had a portion of it been, by itself, admissible for any purpose, or, in any degree, had been proper evidence. Moreover, two of the appellants were not parties to the chancery suit; and unless the record of that suit would be legal evidence against them, it would not be admissible for them. The record does not show certainly what privity exists between those two of the appellants and Chiles, the other appellant.

2. On the motion of the appellees, the Circuit Court gave the following instruction to the jury: "That the deed from Hays' heirs to Chiles passes no title so far as said deed covers the land of Taylor;" that is, the land which Hays had previously conveyed to Taylor. As the deed to Taylor had never been recorded, it was inoperative so far as Chiles was concerned, if he was a *bona fide* purchaser, for a valuable consideration, without notice. Whether he was such a purchaser, and whether at the time of his purchase (that is, when he paid the consideration and obtained his deed), he had notice, express or implied, were questions which the jury, and not the Court for them, had a right to decide. The instruction of the Court was, therefore, erroneous.

3. The Court also gave to the jury the following instruction: "That the instrument of writing from William Bridges to Arthur Conley, dated the 6th of February, 1806, was a deed of bargain and sale, and sufficient to transfer the title of *Hays* to Conley." The writing here alluded to is as follows:

"For value received, I bargain and sell unto Arthur Conley, my whole right of improvement made by John Brown, and all the land as far as Thomas Miller's claim interferes with my claim. Given under my hand and seal this 7th day of February, 1806.

"WILLIAM BRIDGES. [SEAL]

"Test:

"THOMAS BOYD, }  
"JOHN ROBINSON." }

The literal import of this writing is that of an executed agreement, or a conveyance of the title which the vendor held. It contains all the essential requisites of a conveyance in fee simple. It is informal and unusually summary, when compared with the redundant, quaint, and prolix style of modern conveyances by deed. But it is not more laconic or less comprehensive than the ancient Saxon deeds, and is almost as formal and elaborate as the antiquated charters of enfeoffment; and, indeed, its form and style are, in some respects, preferable to the repletion and repetitions which unnecessarily characterize and greatly deform modern deeds of conveyance. It is sealed, and signed, and attested properly; it shows a valuable consideration; it identifies the parties; describes the land, and acknowledges an absolute executed sale in fee of the vendor's right. These constitute a deed of conveyance; and therefore, as this instrument contains no provision or intimation to the contrary, this Court cannot, by any allowable process of interpretation, give to it any other character or effect than those of a deed of bargain and sale: Co. Lit. 7, a; 4 Kent's Com. 460-1.

But, nevertheless, the Circuit Court erred in instructing the jury that this deed from Bridges to Conley, "was sufficient to

transfer the title of *Hays* to Conley." It transferred no other title than that which Bridges held ; and there is no proof that he had acquired the legal right, unless a conveyance from Hays to him should be *presumed*. But such a presumption, should the facts authorize it, is not, in this case, conclusive and incontrovertible, but is, at the utmost, only of that class denominated "presumptions of *law* and of *fact* ;" and which, therefore, may be repelled by facts to be weighed and considered by a jury. Occupancy for twenty years under an executory agreement of purchase, in the absence of any other explanatory or inconsistent facts tending to a contrary conclusion, will, as an artificial deduction of law, create a presumption of a conveyance ; and a Court may so inform a jury. But though such a technical effect be given to such a state of fact, nevertheless, the presumption is not of that kind denominated "presumptions of *law*" merely ; such as the legal presumption of fraud, or the legal presumption (at common law), of a consideration for every deed, and which could not be resisted, contradicted, or explained, by extraneous facts. As the presumption in this case is not legal only, and therefore inflexible, but is a presumption of both law and fact, and consequently may be rebutted by facts, the Circuit Court ought not to have given the peremptory instruction to the jury, but should, after telling them what the law of the case was, have left the deduction to *them*. The possession was not adverse as long as the agreement, under which it was taken, continued to be executory ; for though Bridges had conveyed to Conley, the latter could have held, in contemplation of law, only as the former had. If Bridges held as *quasi* tenant, his vendee held in the same way under the first vendor.

In consequence only of the two errors which have been noticed, the judgment must be reversed, and the cause remanded for a new trial.



*Office Grant.*

The method of transferring title through officers of the law, as administrators, executors, guardians, sheriffs, etc., hereinbefore considered, is generally known as acquiring title "by office grant."

MENAGE v. JONES.

Supreme Court of Minnesota, 1889.

40 Minn. 254.

GILFILLAN, C. J. The Probate Court of Hennepin County granted to Maria L. Gove, of Concord, N. H., as guardian of the estate of Charles Augustus and Jesse Ridgely Gove, of the same place, minors, a license to sell real estate of said minors situated in said county. Pursuant to such license the sale was made and confirmed, and the real estate accordingly conveyed to the purchaser, whose title plaintiff has, as also the title of Maria L. Gove. The defendant claims title under conveyances from Charles Augustus and Jesse Ridgely Gove. The only question is the validity of the guardian's sale. It appears from recitals in the order of license that it was made upon the petition of said Maria L. as such guardian, praying for such license, and upon due proof of notice having been duly published as ordered, and after a full hearing, and a determination that the sale was necessary and for the benefit of the wards.

The principal objection made to the sale is that the Probate Court of Hennepin County had no jurisdiction to grant the order of license. Of course, the sale and conveyance of real estate, whether the property of wards or others, must be made pursuant to the laws of the State in which it is situated. In this case the laws of New Hampshire had nothing to do with the sale. The Court in that State could not authorize it, nor determine whether it ought to be made. That was solely and entirely within the jurisdiction of the Courts, and under the laws, of this State. In the case of a person under guardianship residing out of the State, and having no guardian appointed in it, the foreign guardian may file an authenticated copy of his appointment in the Probate Court for any county in which there is real estate of the ward, after which he may be licensed to

sell real estate of the ward in any county, in the same manner and upon the same terms and conditions as are prescribed in the case of a domestic guardian: Gen. St. 1878, c. 57, § 32. The Probate Court of Hennepin County (there being real estate of the ward situated in that county) was, then, the proper Probate Court to which to apply for license to sell the real-estate. It was the "Probate Court having jurisdiction," as those words of the statute have been construed by this Court: *Montour v. Purdy*, 11 Minn. 278, 384; 88 Am. Dec. 88; *Rumrill v. First Nat. Bank*, 28 Minn. 202; 9 N. W. Rep. 731. This being so, the proposition in *Davis v. Hudson*, 29 Minn. 27, 11 N. W. Rep. 136, that "where a Probate Court possesses general jurisdiction of a given class of subject-matters, the possession of jurisdiction assumed to be exercised in a particular case falling within such class is, in collateral proceedings, presumed," would seem to apply; and the Court in that case held that the presumption could be rebutted only by the record.

It is, however, unnecessary in this case to resort to that rule, for that the Probate Court of Hennepin County had jurisdiction to grant the license appears by the record. It appears that the person claiming to be guardian by the appointment in New Hampshire filed a petition, praying that license to sell the real estate be granted, in the Probate Court of Hennepin County, and that gave jurisdiction after notice, which the record shows, to hear and determine the matter, and grant or refuse such license according to its determination. Upon such hearing it was necessary for the petitioner to show, and for the Court to pass on it, that she was guardian by due appointment of the Court in New Hampshire, and had complied with the law of this State by filing an authenticated copy of her appointment; but a wrong decision, or a decision on incompetent or insufficient evidence, as to those facts, would be only error to be corrected by appeal, and would not affect the jurisdiction. The jurisdiction did not depend on the validity of the appointment in New Hampshire, for nothing done there could give or take away or affect the jurisdiction of the Court in this State. Whether the appointment in that State was valid

or invalid was to be tried and determined on the hearing of the petition for license. The Probate Court in Hennepin County had jurisdiction. All that was necessary to show authority to make the sale was the record in the Hennepin County Court. And had that record been impeachable in this collateral proceeding, the evidence introduced or offered by defendant would have been of no avail to impeach it.

The only other objection to the purchaser's title so serious that we need mention it, is to the deed executed by the guardian. The objections to it are that it does not recite the authority under which it was made, to wit, the license of the Probate Court, and that it does not purport to convey the ward's estate in the land, but runs in the name of the guardian as grantor. The deed certainly is not in the best form. It is about as scant as would be safe to have it. It describes the grantor as the guardian of the two minors, and is executed by her as such ; states that the land descended to them from their father, deceased, subject to her (the guardian's) dower ; and the dower is expressly excluded from the grant.

There is no reference to the proceedings in the Probate Court of Hennepin County authorizing the sale. Of course, the deed could be of no effect unless executed pursuant to the authority thus given. It is usual in a deed executed by a person not in his own right, but by virtue of authority conferred on him, to recite, or at least make reference to, the authority under which the deed is executed. But as in such case the authority must be shown independent of the deed, however full that may be, it is not absolutely essential that there should be any reference to it in the body of the deed, provided it appears from the entire deed that it was executed pursuant to the authority. Thus in *Tidd v. Rines*, 26 Minn. 201, 2 N. W. Rep. 497, a deed executed by an attorney-in-fact was held good, though there was no reference to the authority, except in the signature of the attorney ; and in *Berkey v. Judd*, 22 Minn. 287, that the attorney need not sign his own name—the deed appearing on its face to be the indenture of the principal, made by his attorney-in-fact, designated by name ; and in *Bigelow v. Livingston*, 28

Minn. 57, 9 N. W. Rep. 31, it was held good, though the seal might of itself be taken to be that of the attorney—the whole instrument showing it was intended as the seal of the principal. And so in this case, as it was necessary (without regard to the form of the deed) to introduce the record of the Probate Court, it appears beyond any question that the deed was executed pursuant to the license. We hold the deed to be good, so far as concerns that objection.

In making the other objection, to wit, that the deed runs in the name of the guardian as grantor, and not in the names of the wards, the appellant confounds deeds executed under authority of, and as agent for, the grantor, in which case the deed must be in the name of the principal, and those executed upon judicial sales, as sheriffs' deeds, executors' or administrators' deeds, or guardians' deeds, which are made by the person making them in an official character, and not by authority nor as agent for the owner. In regard to these deeds, Freeman, in his work on Void Judicial Sales, § 47, states the general rule (in the absence of any statute prescribing the requisites of such a deed) thus: "Of course, the deed must be executed with the formalities essential to other deeds, and must show that the person who signs it is acting in an official capacity, and not merely conveying his own title to the property." That appearing, and the power to make it being shown, it is as good as an official deed. We see nothing in any other assignment of error that needs special mention.

Order affirmed.

3 Washburn R. P. 220.

*Title passes under deed by delivery.*

HAWKES v. PIKE.

Supreme Judicial Court of Massachusetts, 1870.

105 Mass. 562.

One Fairchild executed a deed to his son Silas, and left it with the register of deeds for record. After recording it, the register returned it to the

grantor. The deed was never given to Silas, and the day after executing this deed Fairchild executed and delivered a deed of the same land to one Hawkes. Pike held a mortgage on this land executed by Fairchild prior to the two aforesaid deeds. The mortgage was foreclosed, and Hawkes files his bill in equity to redeem. Pike claims that he has no right to do so, as Silas has a deed prior to that of Hawkes, and that he is the only one having the right of redemption.

AMES, J. A deed of real estate, in order to take effect as a conveyance of title, must be delivered by the grantor, and actually or by implication accepted as his own by the grantee: 3 Washb. Real Prop. (3d ed.) 254. No definite or specific formality is prescribed by law, but it must be the concurrent act of two parties. It must appear that the grantor parts with the control and possession of the instrument with the intention that it shall operate immediately as a transfer of title, and that it passes into the hands or is placed at the disposal of the grantee, or of some other person in his behalf: *Harrison v. Phillips Academy*, 12 Mass. 456; *Maynard v. Maynard*, 10 Mass. 456; *Elmore v. Marks*, 39 Verm. 538; *Jackson v. Phipps*, 12 Johns. 418. The register of deeds may have been the person agreed upon as the agent of the grantee, and in such a case a deed left with him for record is sufficiently delivered. But registration of itself does not operate as a delivery, nor does it supersede the necessity of proof of a delivery: *Parker v. Hill*, 8 Met. 447; *Samson v. Thornton*, 3 Met. 275.

In this case there was no delivery directly to the grantee, who was in California at the date of the deed, and we see nothing in the report that shows a delivery to any person for him. The scrivener who drew up the deed at the grantor's request had no authority from the absent grantee, and did not undertake to act for or to represent him. He assumed no trust, and came under no responsibility to him. He was not requested to keep the deed for him, or send it to him. He was employed by the grantor only, and all that he was to do or undertook to do, was in his official capacity of register to record the deed, and the only reason which he gave for not giving it up when called upon, was that the record had been begun but not finished. It was then simply a delivery to the register for

the purpose of registration, which is wholly insufficient to pass any title to the grantee. There was no agent to accept the deed; no delivery to give effect to the deed as a conveyance. On the contrary, it appears from the grantor's testimony, which seems to be uncontradicted, that the delivery which he had in his mind was to take the deed from the register and send it by mail to his son in California.

The letters upon which the defendant relies to show that the grantor intended to convey the property to his son, are not at all inconsistent with a total change of mind before that intention was carried into effect.

Decree reversed.

SMITH ON CONTRACTS, 6; *Heffron v. Flannigan*, 37 Mich. 274; *Scrugham v. Wood*, 15 Wend. 545; *Regan v. Howe*, 121 Mass. 424; *Fisher v. Hall*, 41 N. Y. 416; *Stevens v. Hatch*, 6 Minn. 64; *Lansing v. Gaine*, 2 Johns. 300; *Thompson v. Easton*, 31 Minn. 99.

## C

### TITLE BY DEVISE.

#### 1

#### WILL.

**Title to land by devise is that which a person takes under and by virtue of a will, *eo instanti*, at the death of the devisor.**

*IVES v. ALLYN.*

Supreme Court of Vermont, 1841.

13 Vt. 629.

The plaintiff brought an action of ejectment to recover possession of certain lands to which he had acquired title through a will, the evidences of the probate of which were not duly recorded until after the action was commenced.

REDFIELD, J. No questions are reserved in this case, except those which arise upon the face of the papers introduced by

the plaintiff, for the purpose of showing title to the premises demanded. The only question, therefore, which the Court have deemed it necessary to decide is how far the devise upon which the plaintiff relies can avail him. They were never filed and recorded in any probate office in this State until since the bringing of this suit. At the last term of this Court, in the same case, it was decided that the probate of the wills in the State of Rhode Island could not avail the plaintiff in this State. Since that time the requisite probate has been made in this State.

It is true that the plaintiff must recover upon his title as it existed at the time of bringing suit, but the recording of deeds, necessary to their being read, may be done at any time before the trial. When the deed is recorded it takes effect from the delivery. So in this case, it is the death of the devisor that vests the title. At common law no probate of a devise or will disposing of real estate was required or was of any avail. In this State such probate is indispensable, as the Probate Court have exclusive jurisdiction of the proof of wills, of real as well as personal estate. But this is mere matter of evidence, and if done at any time before the trial the devise takes effect from the death of the devisor.

The question whether the land named in the devise is the same land sued for was one of fact for the jury, and not subject to revision here.

Judgment affirmed.

3 Washburn R. P. 566, § 31; *Ex parte Fuller*, 2 Story, 327; *Thieband v. Sebastian*, 10 Ind. 454.

*Lex loci rei sitæ* governs in the construction of wills of realty, but *lex domicilii* in wills of personalty: *Lynes v. Townsend*, 33 N. Y. 561; *Potter v. Titcomb*, 22 Me. 300; *Kerr v. Moon*, 9 Wheat. 565; *Swearingen v. Morris*, 14 Ohio St. 424; *Richards v. Miller*, 62 Ill. 454; *In re Swenson's Est.*, 55 Minn. 300; *Hovey v. Walbank*, 34 Pac. Rep. 650; 100 Cal. 192; *Perkins v. McConnell*, 36 N. E. Rep. 121.

## 2

The devisee, though presumed to assent to the devise if beneficial to him, may disclaim the estate, and the devise will then be inoperative as to him.

PERRY *v.* HALE.

Supreme Judicial Court of New Hampshire, 1862.

44 N. H. 363.

One Joseph Hale died testate, having devised certain land to his wife, and upon her death to his son, Edgar Hale, a minor, on condition that he should pay \$700 to one of his sisters and \$800 to the other. The wife died before Edgar was of age, and his guardian took possession of the land, refusing to pay the legacies until the minor should reach his majority. The plaintiff (one of the sisters, now married to Perry) files her bill in equity to have the legacy declared a charge on the land and payable therefrom.

BELL, C. J. Where a legacy is charged on land, an action of assumpsit, or debt, will lie against the devisee to recover it in certain cases: *Piper v. Bennett*, 2 N. H. 439. To the maintenance of such action it is necessary that the devisee should have accepted the devise, of which the most usual and satisfactory evidence is his entry upon it—his possession and occupation of the devised property: *Beecker v. Beecker*, 7 Johns. 99; *Van Orden v. Van Orden*, 10 Johns. 30; *Pickering v. Pickering*, 6 N. H. 120; *Pickering v. Pickering*, 15 N. H. 290; *Kelsey v. Western*, 2 Comst. 501; *Birdsall v. Hewlett*, 1 Paige, 32; *Glen v. Fisher*, 6 Johns. Ch. 34.

A devisee is presumed to assent to a devise which is apparently beneficial, unless he expressly renounces it; but he may waive, or disclaim the estate, and the devise will then be inoperative as to him: *Stebbins v. Lathrop*, 4 Pick. 33; *Touch. 319*; *Birdsall v. Hewlett*, 1 Paige, 32. This presumption of assent is never conclusive; neither are acts that indicate a design or intention to accept: *Wheeler v. Lester*, 1 Bradf. 293. If the property devised is subject to a condition or burdened with a charge, the devisee or legatee is allowed a reasonable time and opportunity to judge of the value of the bequest and of the burden of the condition before he decides to accept or



reject it : *Ib.* But by entering into possession of the property the devisee accepts the gift with the condition : *Pickering v. Pickering*, 6 N. H. 120 ; and evidence that a third person was in possession, to whom the devisee gave directions as to his remaining and quitting the possession, is sufficient evidence of entry and possession : *Tole v. Hardy*, 6 Cow. 340.

If a legacy is charged on land the land will be subject to the charge, not only in the hands of the devisee, but in those of an assignee : *Veazey v. Whitehouse*, 10 N. H. 409 ; *Leavitt v. Wooster*, 14 N. H. 550 ; *Pickering v. Pickering*, 15 N. H. 290 ; *Copp v. Hersey*, 31 N. H. 317 ; *Harris v. Fly*, 7 Paige, 421 ; *Nellows v. Truax*, 6 Ohio N. S. 97.

On every transfer of the whole estate, the grantee, who takes the estate charged with a duty which may arise upon a contingency, or with a continuing duty, which constitutes no debt, or a duty which arises from time to time, may be held by an implied promise to perform the duty or pay the charge which accrues in his time ; and perhaps be charged in an action at law. But the remedy against several assignees of different parts of the estate is by bill in equity : *Pickering v. Pickering*, 15 N. H. 290.

In regard to legacies charged on land, Courts of Equity exercise an extensive and in some cases an exclusive jurisdiction : 1 Story Eq. 602.

In equity and at law the personal estate of a testator is held the primary fund for the payment of legacies : *Harris v. Fly*, 7 Paige, 427 ; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379 ; *Roper on Leg.* 163 ; *Leavitt v. Wooster*, 14 N. H. 565, and cases cited ; and it is not relieved from liability in the first instance, where the legacy is made a charge on the real estate, unless such is indicated in the will as the intention of the testator : *Hanna's Ap.*, 31 Pa. St. 53 ; *Glen v. Fisher*, 6 Johns. Ch. 34 ; *Adams' Eq.* 263, n. 1 ; *Patterson v. Scott*, 2 D., M. & G. 531 ; *Collins v. Robbins*, 1 D., M. & G. 131 ; *Buckley v. Buckley*, 11 Barb. 77 ; *Leavitt v. Wooster*, 14 N. H. 550.

The intention of a testator to first charge the realty with the payment of legacies must be express or clearly implied, not

only as an intention to charge realty but to exonerate personalty : *Whitehead v. Gibbon*, 2 Stockt. 230 ; *Kelsey v. Western*, 2 Comst. 506 ; *Dodge v. Manning*, 1 Comst. 298 ; *Livingston v. Newkish*, 3 Johns. Ch. 325 ; *Tole v. Hardy*, 6 Cow. 333. The old law is said to have been that the personal estate could not be exempted from the payment of debts and legacies without express words ; but it is held sufficient if there appears upon the will a plain intention or necessary implication : *Hoes v. Van Hosen*, 1 Comst. 120. And it is said it is not material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A., he paying the debts or legacies or the like : *Ib.* ; *Bridgeman v. Dove*, 3 Atk. 202 ; 2 Vern. 120 ; 9 Ves. 444 ; *Roper on Leg.* 163. But this would seem to be one of the circumstances to be weighed with others in the will, as indicating the intention of the testator. An absolute and specific disposition of all the personal estate of the testator, not a mere residuary bequest, is sufficient to manifest the intent of the testator to charge the realty in exoneration of the personalty : *Kelley v. Deys*, 3 Cow. 133. From the principle that the personal estate is the fund first liable to the payment of legacies, it results that where the personal estate is not intended to be exonerated the receipt by the executor of personal assets, sufficient to pay the legacies, discharges the real estate from further liability for the payment of them ; and where such assets are wasted or misapplied by the executor the loss falls upon the legatee, and he cannot resort to the real estate upon which the legacy is charged, either in the hands of the devisee or of any purchaser from him : *Sims v. Sims*, 2 Stockt. 168 ; *Glen v. Fisher*, 6 Johns. Ch. 34 ; *Birdsall v. Hewlett*, 1 Paige, 32 ; *Willard Eq. Jur.* 488.

And it has been held that the purchaser may insist that the legatee shall first exhaust his remedy against the devisee personally, as well as against the personal estate of the testator, where that is the primary fund : *Glen v. Fisher*, 6 Johns. Ch. 34 ; *Dodge v. Manning*, 1 Comst. 298 ; though the equity of that rule is not evident.

The rule as to the equitable charge upon the estate devised

is the same, where the devise fails wholly at law, or is not capable of being enforced at law, as if the estate is devised to the heir-at-law, or to a stranger, upon condition that he pay the legacy. In the first case the devise to the heir is void at law, yet in equity it is good as an equitable charge upon the land of the heir, who is directed to pay it: *Smith v. Atherley*, 3 Rep. in Ch. 93; s. c., *Freem. Ch.* 36; and in the next case, if the stranger renounces the estate upon which the devise as to him becomes inoperative, yet the equitable charge remains, so, though a stranger cannot enter upon the land on breach of the condition, the Court will consider the heir-at-law a trustee for the legatee, for the purpose of charging the land with the payment of the legacy: *Harris v. Fly*, 7 Paige, 427.

Though a legatee may elect, or may be compelled to resort to the personal estate, as the fund first liable to the payment of a legacy, yet the legatees of the personal estate, thus applied, will in equity be entitled to stand in the place of the legatees whose legacies were charged on the land as against the land itself: *Adams Eq.* 263, n. 1; *Patterson v. Scott*, 2 D., M. & G. 531; *Lockwood v. Stockholm*, 11 Paige, 87; *Crider's Ap.*, 11 Pa. St. 72.

Some decisions in this State seem in conflict with the principles before stated, that the legatee whose legacy is charged on land cannot charge the land if there is sufficient personal assets. In *Leavitt v. Wooster*, 14 N. H. 566, *GILCHRIST, J.*, says: "In the case of *Gookin v. True*, 3 N. H. 288, an action was brought on a probate bond to recover certain legacies charged on land, where the devisees of the land had entered upon it. It was held that the legacies could not be considered a charge upon the estate generally, which the executor was bound to pay; that their non-payment was not a breach of the bond, and that the action could not be maintained." It is also to be inferred from the case of *Veazey v. Whitehouse*, 10 N. H. 410, that where the charge is upon the land the executor is not liable upon his bond. An action of assumpsit was brought in that case against the assignee of the land charged with the support of the testator's daughter, and maintained;

and such was the case also in *Pickering v. Pickering*, 6 N. H. 120. The first of these cases, however, is reconcilable with the principle before stated. The testator devised to his executor so much of his personal estate as should be sufficient to pay his debts and incidental charges, and if any remained it should be the property of A. D. He gave his real estate to his son, and directed that he pay S. B. and H. D. fifty dollars each, and the action was brought on the probate bond to recover these legacies. The case falls within the rule before stated, that an absolute and specific disposition of all the personal estate shows an intent to charge the real and exonerate the personal property. In the second case no question was made upon the points, and the facts necessary to raise the question are not stated. The third case was against an assignee of the real estate, and it was not suggested that there were personal assets or that the assignor was responsible.

If the Court adopt the rule that the personal estate is the fund first chargeable for the payment of legacies, as there is nothing stated in the bill as to the personal except the household furniture, it may be necessary to amend the bill, so as to show that there was not sufficient personal estate to pay the legacies, or that it was specifically bequeathed to others. It is not necessary perhaps now to decide this point.

The answers in this case present two points, which are relied on as matter of defense: First, that the defendant, the devisee, had never accepted the devise nor been in possession of the devised estate; the other, that it was the intention of the testator to give his son till he should be twenty-one years of age to determine whether he would accept the estate.

The minority of the devisee precludes his personally doing any valid act to bind himself to his prejudice, and it is not pretended that he has done anything to affect his right. The estate remained in the hands of his mother during her life, and after her death the plaintiff, George S. Perry, as guardian of the devisee, entered into possession of the estate, and continued to occupy it till his resignation, in January, 1861, since which time it has been in possession of a trustee appointed by

the Court of Probate, under the will, to fill the place of the executors. It cannot be supposed that this trustee has any such relation to the devisee as would make the possession of the trustee an acceptance of the devise to bind the devisee. We have found no decision that a guardian of a minor has authority to accept or reject a devise made to his ward, so as to bind his estate. Ordinarily, a guardian has no right to purchase real estate for his ward, or to sell it, unless under the license of the Court of Probate ; and we think that the plaintiff, being himself the guardian, cannot avail himself of his own act as an assent to a devise, which might be most prejudicial to his ward, where his own interest and that of his ward were opposed.

. If this were an action at common law the point of acceptance would be vital, since upon it the right of action depends ; but in this proceeding in equity nothing depends upon that, except the question whether the devisee shall be charged personally, since the bill has for its object to charge the land as well as the person of the devisee ; and a decree may be made to charge the land itself by a sale, though no person appears to be personally chargeable.

As to the other point, the intention to allow the devisee till twenty-one to make his election to accept the devise, it is of no importance as to the charge upon the land, except as it bears upon the question of the time when these legacies are to be paid. The land is liable to the payment in any event. If, by the fair construction of the will, these legacies were payable when this action was commenced, the legatees must have a right to commence proper proceedings to enforce payment of them, whether the devisee had made his election or not ; the true nature of the devise being that the testator gave to the legatees so much out of the real estate, and the balance to the devisee. But if the legacies, from the terms or fair construction of the will, were payable only after the devisee should arrive at twenty-one, the bill is prematurely brought. The question is one affecting the interest as well as the right of action, since a legacy draws interest from the time it is payable.

The general rule is that legacies for which no other time of payment is fixed are payable in one year from the decease of the testator. There seems no color to contend that these legacies were so payable, inasmuch as the real estate is given to the widow during her widowhood, and after her death, or marriage, to the devisee on condition that he pay these legacies.

This is one of the cases where the course of events has not fallen out agreeably to the expectation of the devisor. He probably supposed that his wife would live much beyond the full age of her son, as was the reasonable probability; and as is shown by the provision that after the son should arrive at twenty-one he and his mother should have the management of the property. In that event the legacies might be payable when the estate should vest in possession of the son by the death of his mother, which might be an early or a very distant day; or when the devisee should arrive at twenty-one. It would seem unreasonable to impose on the son the payment of these legacies, when he should arrive at twenty-one, when the whole of the property was given to the widow for a term which the testator expected to continue after that time, and which might continue for so long a time that the payments and the interest might far exceed the value of the property. The natural construction would seem to be that the son should become liable to pay the legacies when he should come into possession of the property by the expiration of his mother's interest, as until that time he would have no means derived from the will to pay the legacies. If this is the just inference as to the testator's intention in the events which he anticipated, it seems equally just as the contingencies have occurred. By the death of the widow the son became entitled to the benefit of the property, and the means to pay the burdens upon it, and no reason is seen why his sisters should not at the same time become entitled to their shares of it; that is, to their legacies, unless it may be found in the provision that the executors should manage and carry on the farm till the son, Edgar, became of age; but we think it cannot have that

effect. The executors were to carry on the farm during the life of the widow, as well as after, and nothing in the will indicates that they were so to carry it on for the benefit of themselves, or any other person than the widow while her estate continued, and then of her son. They must, therefore, be deemed trustees for her, and after her death equally trustees for Edgar, and their possession for all substantial purposes must be his possession, since they must be accountable to him for the income.

There must be a decree in favor of the plaintiffs, charging the land, the form of which, unless the parties agree, will be directed by the Court.

May a devisee disclaim to the disadvantage of his creditors? *Stebbins v. Lathrop*, 4 Pick. 33.

The devisee takes the land subject to all burdens: *Wilkinson v. Leland*, 2 Pet. 658.





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